This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

NORTHWESTERN UNIVERSITY
1851

The
Stanford
Law
Library
Edward W. Rice Book Fund

AN
BWO
UQc

WIGMORE CELEBRATION
LEGAL ESSAYS

CELEBRATION LEGAL ESSAYS

By Various Authors

To Mark the Twenty-fifth Year

of Service of

JOHN H. WIGMORE

As Professor of Law in
Northwestern University

CHICAGO

NORTHWESTERN UNIVERSITY PRESS

1919

COPYRIGHT, 1918-1919
By
NORTHWESTERN UNIVERSITY PRESS

All Rights Reserved

CELEBRATION LEGAL ESSAYS

TABLE OF CONTENTS

PAGE

List of Contributors and Publication Committee xi

Portrait of John H. Wigmore ..... *facing* 1

Editorial Preface 1

PART I

THEORY AND PHILOSOPHY OF LAW

Lay Fallacies in the Law 5
Sir Frederick Pollock.

The Latest Phase in Legal Evolution 18
W. Jethro Brown.

New Conception and New Bases of Legal Philosophy 25
Alejandro Alvarez.

PART II

COMPARATIVE LAW

Some Curiosities of International Marriage Law 41
J. W. Brodie-Innes.

The Study of Indonesian Customary Law 58
C. Van Vollenhoven.

The French Administrative Courts and the Modern French Law as to the Responsibility of the State for the Faults of Its Officials: A Comparison with the Common Law 63
Frederick P. Walton.

PART III

CRIMINOLOGY

Revision of the Chinese Criminal Code 77
Chung-Hui Wang.

The Concept of Punishment 92
Ugo Conti.

PART IV

LEGAL EDUCATION

Some Essentials of a Modern Legal Education 113
John Bradley Winslow.

PART V

LEGISLATION

Prolegomena to a Science of Legislation 122
Ernst Freund.

PART VI

ANALYTICAL JURISPRUDENCE

Legal Possession—Two Maxims 151
Henry Goudy.

Fault, Risk, and Apportionment of Loss in Responsibility 155
René Demogue.

Possession 170
Henry T. Terry.

TABLE OF CONTENTS

PART VII
INTERNATIONAL LAW

PAGE

A—PUBLIC INTERNATIONAL LAW

THE INTERCONNECTION OF NATIONALITY AND DOMICILE 187
Th. Baty.

B—PRIVATE INTERNATIONAL LAW

HUBER'S DE CONFLICTU LEGUM 199
Ernest G. Lorenzen.

PART VIII
PUBLIC LAW

A—THEORY

MONTESQUIEU AND ANGLO-AMERICAN INSTITUTIONS 243
William G. Hastings.

A LEGAL HERESY 255
John M. Zane.

B—CONSTITUTIONAL LAW

(A) ENGLISH

THE BEGINNINGS OF ENGLISH CONSTITUTIONAL THEORY 287
H. J. Randall.

(B) CANADIAN

DOMINION AND PROVINCIAL POWERS UNDER THE BRITISH NORTH AMERICAN ACT, 1867 324
Angus J. McGillivray.

C—ADMINISTRATIVE LAW

COMPENSATION FOR LOSSES OF WAR 357
Léon Duguit.

D—MILITARY LAW

THE MODERNNESS OF ROMAN MILITARY LAW 373
Charles P. Sherman.

PART IX
LEGAL HISTORY

PRELIMINARY NOTES UPON THE ANGLO-SAXON DOCUMENTS OF THE EIGHTH AND NINTH CENTURIES 384
Francesco Brandileone.

THE EARLY HISTORY OF THE ATTORNEY AND SOLICITOR GENERAL 394
W. S. Holdsworth.

A TEXT OF Q. CERVIDIUS SCAEVOLA ON SALES MADE THROUGH THE AGENCY OF BANKERS 412
Paul Huvelin.

PART X
PRIVATE LAW

CONSIDERATION IN EQUITY 435
Roscoe Pound.

THE CONFLICT OF INTERESTS LEGALLY PROTECTED IN FRENCH CIVIL LAW .. 461
Joseph Charmont.

TABLE OF CONTENTS

HAS THERE BEEN JUDICIAL LEGISLATION IN THE INTERPRETATION AND APPLICATION OF THE "UPON CONSIDERATION OF MARRIAGE" AND OTHER CONTRACT CLAUSES OF THE STATUTE OF FRAUDS? 473
George P. Costigan, Jr.

LIABILITY OF PERSONAL REPRESENTATIVES ON LEASES 515
John R. Rood.

MUTUAL ASSENT IN THE FORMATION OF CONTRACTS 525
Samuel Williston.

LIBERTY OF TESTATION AND SOME MODERN LIMITATIONS THEREON 536
Orrin K. McMurray.

ADVERSE POSSESSION AGAINST REVERSIONERS AND REMAINDERMEN 564
Albert M. Kales.

INDEX 587

LIST OF CONTRIBUTORS

ALEJANDRO ALVAREZ,
Washington, D. C.

TH. BATY,
London, England.

FRANCESCO BRANDILEONE,
University of Bologna.

J. W. BRODIE-INNES,
Scots Bar.

W. JETHRO BROWN,
University of Adelaide.

JOSEPH CHARMONT,
University of Montpellier.

UGO CONTI,
University of Modena.

GEORGE P. COSTIGAN, JR.,
Northwestern University.

RENÉ DEMOGUE,
University of Paris.

LÉON DUGUIT,
University of Bordeaux.

ERNST FREUND,
University of Chicago.

HENRY GOUDY,
Oxford University.

WILLIAM G. HASTINGS,
University of Nebraska.

W. S. HOLDSWORTH,
Oxford University.

PAUL HUVELIN
University of Lyon.

ALBERT M. KALES,
Chicago, Ill.

ERNEST G. LORENZEN,
Yale University.

ANGUS J. MCGILLIVRAY,
Ottawa, Canada.

ORRIN K. MCMURRAY,
University of California.

SIR FREDERICK POLLOCK,
London, England.

ROSCOE POUND,
Harvard University.

H. J. RANDALL,
Bridgend, England.

JOHN R. ROOD,
University of Michigan.

CHARLES P. SHERMAN,
New Haven, Conn.

HENRY T. TERRY,
New York, N. Y.

C. VAN VOLLENHOVEN,
University of Leyden.

FREDERICK P. WALTON,
Cairo, Egypt.

CHUNG-HUI WANG,
Peking, China.

SAMUEL WILLISTON,
Harvard University.

JOHN BRADLEY WINSLOW,
Madison, Wis.

JOHN M. ZANE,
Chicago, Ill.

PUBLICATION COMMITTEE
GEORGE P. COSTIGAN, JR.
FREDERIC B. CROSSLEY
ROBERT W. MILLAR

EDITOR
ALBERT KOCOUREK

JOHN H. WIGMORE

Dean of Northwestern University School of Law

From a painting by Arvid Nyholm

EDITORIAL PREFACE

The array of distinguished legal scholars who join here to do honor to a colleague sufficiently justifies the proposal now brought to realization, to commemorate a quarter century of service by John H. Wigmore as Professor of Law in Northwestern University. The suggestion that the event be marked in this appropriate way met instantly with the heartiest response in all quarters.

When this festival publication was conceived, the great catastrophe of the world war had already begun to rock the civilizations of Europe, as it then seemed, to the very foundations. The United States had not yet joined the coalition of western democratic powers. It did not seem probable then that the slaughter of lives and the destruction of spiritual and economic values could, as the event has shown, continue beyond the time when this celebration volume would be issued. It was our hope that this occasion would overtake an era of peace and international good-will. Had it been possible to know what was written down in the book of fate, it is not unlikely this commemoration would have been postponed to a happier and less heroic hour in the affairs of the world. That so many of the great names in the annals of legal science are here represented, notwithstanding the distraction and pain of mind caused by the unprecedented events of the last four years, to say nothing of the additional burdens of one kind and another cast on nearly everyone of those who participate here, is a remarkable exhibition of the affection and esteem in which Professor Wigmore is held by his co-workers in all parts of the world.

If Professor Wigmore will miss in this gathering of illustrious scholars any names of those who by pledge of personal friendship or common interest would be entitled to a place, the explanation must lie in the world misery which makes this volume, published in wartime, a splendid monument by its mere existence. The preoccupations of a turbulent era, which have even taken Professor Wigmore from the domain of rules supported by latent force to a field where the order is inverted and force is directed by rules, are too forceful to be resisted, and inter arma not only laws, but friendships may be silent. Death, illness, and infirmities of age also may claim their respective explanations.

But a festival publication must have limitations whether in time of war or peace. While it was within our knowledge that Professor Wigmore by reason of his many-sided activities was on terms of intellectual and personal intimacy with scholars in many diversified avenues of thought, it was not in question that any department of learning other than law could be drawn upon. And even in the field of law which is Professor Wigmore's chiefest interest, it was possible to represent only a fractional part of his many world-wide associations.

First, the channels of communication with foreign countries have been obstructed. And, again, space limitations have made it necessary to be ruthless with numerous personal friendships and professional relations of Professor Wigmore, especially in America. All this, while inevitable, must remain a source of regret—first to Professor Wigmore; next to those who for any of the reasons touched upon have not been able to participate; and lastly to the publishers who would have been gratified to assist in the most extensive way in the objects of this celebration. But, after all, it will be realized that a festival publication can not be like a reception where a hundred or more persons may come for a brief moment to greet the host or guest of honor and then depart, but that it is like a house-party which must be adjusted to various physical conditions.

It was possible at one time to denote a contrast by ranging "from China to Peru." The reader will find in glancing over these essays that he may quickly do much more in the exploitation of diversities. He may, for instance, in a few minutes reading pass from London to Adelaide, from Scotland to Chile, from Peking to Cairo. It was not a special object of the Publication Committee to deal with geographical questions, but yet it is interesting to find that eminent scholars from all the great land divisions of the earth are here assembled—Asia, Africa, America, Australia, Europe; and so extensive have been Professor Wigmore's connections with the jurists of foreign countries, it cannot be doubted that had it been practicable and desirable to give this celebration so wide a range, all the leading countries of the world, barring only those excluded by the fact of war, would have been represented. The program as executed nevertheless falls little short of that attainment.

Without editorial suggestion to any contributor as to his subject, these essays happily have fallen out in such a way as to make a well-rounded volume in which most of the fundamental divisions

of legal science are entered in one aspect or another. Accordingly, these essays have been classified under the heads of Theory and Philosophy of Law, Comparative Law, Criminology, Legal Education, Legislation, Analytical Jurisprudence, Legal History, International Law, Public Law, and Private Law. In one or two cases, on account of the late arrival of MSS., the classification may appear somewhat arbitrary. It is fitting that the subject-matter should take on such wide and interesting range, since Professor Wigmore in his remarkably active and productive career has on his part made valuable contributions to all these great fields of legal research with perhaps not more than one exception as to the whole list.

The adoption of a classification has removed what conceivably might have presented a serious editorial problem—the matter of rank and precedence to be accorded among notables. In the absence of a better solution it might have been necessary to fall back upon the inartistic but useful device of an alphabetical arrangement of names. The plan adopted, therefore, is arrangement according to classification, and within the various classes, according to the order which seemed to us to present the materials in the most logical and interesting way as a series, from the standpoint of the reader. Only when no such sequence was apparent has the alphabetical order been resorted to.

This is not the time or place to speak in detail of the man and his works. These essays without speaking pay tribute to his learning and his character. They point him out as one—

"Ad quem dii atque homines congessissent omnia ornamenta."

CELEBRATION
LEGAL ESSAYS IN HONOR OF JOHN H. WIGMORE

PART I
THEORY AND PHILOSOPHY OF LAW

LAY FALLACIES IN THE LAW

By Sir Frederick Pollock, Bart.[1]

My purpose is to speak of certain false opinions which are suggested, if not asserted, by the language of more than one old-fashioned textbook; I mean such as were still in vogue less than half a century ago. When I call them lay fallacies I do not mean that they have not deceived, or may not deceive, unwary members

1. [Rt. Hon. Sir Frederick Pollock was born at London Dec. 10, 1845; received his education at Eton (King's Scholar) and Trinity College, Cambridge (M. A., Fellow 1868); is Hon. LL. D. of the Universities of Edinburgh, Dublin, Harvard, and Christiania; succeeded to his father as third Baronet, 1888; Barrister, 1871; Privy Councillor, 1911; Judge of Admiralty Court of Cinque Ports since 1914; editor of Law Reports since 1895; Bencher, Lincoln's Inn, 1906; editor since its foundation in 1885 of The Law Quarterly Review (London); Correspondent, Institute of France, 1894; Associate of the Royal Academy of Belgium, 1913; Prof. of Jurisprudence, Univ. Coll. Lond. 1882-83; Prof. of Common Law in the Inns of Court, 1884-90; Chairman Royal Commission on Public Records, 1910; Corpus Prof. of Jurisprudence, Univ. of Oxford, 1883-1903; Fellow of British Academy, 1902; Hon. Fellow of Corpus Christi College, Oxford, 1906.

His principal writings are the following: Principles of Contract, 1876 (8th ed., 1911); The Law of Torts, 1887 (10th ed., 1916); Digest of the Law of Partnership, 1877 (10th ed., 1915); The Land Laws (English Citizen Series), 1882 (3rd ed., 1895); Essays in Jurisprudence and Ethics, 1882; Oxford Lectures, etc., 1890; Introduction to the History of the Science of Politics, 1890 (revised ed., 1911); The Law of Fraud, etc., in British India (Tagore Law Lectures), 1894; Commentary on the Indian Contract Act (assisted by D. F. Mulla) (3rd ed., 1913); (with Sir R. Wright) Possession in the Common Law, 1888; (with Prof. F. W. Maitland) History of English law, 1895 (2nd ed., 1898); A First Book of Jurisprudence, 1896 (4th ed., 1918); The Expansion of the Common Law, 1904; The Genius of the Common Law (Columbia Univ. Lectures), 1912; Introduction and Notes to Maine's Ancient Law, 1906 (2nd ed., 1908); Spinoza, Life and Philosophy, 1880 (2nd ed., 1899, reissue with addenda, 1912); Leading Cases done into English, 1877; with new matter as L.C.d.i.E. and other Diversions, 1892; The Etchingham Letters, 1899 (with E. Fuller Maitland); contributions to Badminton volume on Mountaineering, 1892, Encycl. Laws of England, Encycl. Britannica, the Cambridge Modern History, and various reviews and periodicals.—Ed.]

of the profession, but that they are signs of failure to give due attention to the peculiar nature of legal science and the proper attributes of legal justice, and are such as easily occur to the first thoughts of a reasonable but uninstructed layman, even if he has not been dabbling in the works of learned persons whose conventional rhetoric, easily discounted by professional readers, he has innocently taken at the face value. Mistakes of this kind are not altogether trivial or harmless. Lawyers know pretty well in a general way what courts of justice are capable of performing and what not; but the citizen who confidently aspires to make the world better in his own sense, not being restrained by practical sense born of experience, will often require the law to perform impossibilities; and when his expectation is disappointed, as it has to be, he will denounce judges and lawyers as if they were in a wilful conspiracy to pervert natural justice. Ancient wisdom has defined justice as the constant will to give every man his due. Whatever may be the shortcomings of this definition, its framers were discreet in not adding any warranty of complete power. Successors who have expanded their words have not always been careful enough to follow their discretion.

I

The most fruitful of these fallacies, if indeed it be not the common root of them all, is the assumption that the law of the land purports to be a general guide for the conduct of life. Viewed in that fashion, it must be admitted that the commandments of the law come sadly short of being adequate. We lawyers know very well, and may find high judicial authority for it if required, that life would be intolerable if every man insisted on his legal rights to the full. It does not take much reflection to perceive that human action cannot be reduced to complete mechanical uniformity, and the most rigid custom, the most minutely framed enactment, must leave a certain margin of discretion; also that, when once discretion is admitted, it may be exercised for better or for worse. But as the greater part of mankind do not reflect adequately, and many not at all, it is easy to take the hyperbolic language of orators and text-writers literally and suppose legal justice competent, and therefore bound, to cover the whole field of conduct.

Misquoted or misunderstood utterances of famous authors have had much to do with the prevalence of false notions in law as in other sciences. Two or three words of Cicero's current in our

books are probably answerable for a great crop of confused thought. He spoke of law, or rather of legislation, as prescribing what is of good report—"iubens honesta"; so it is commonly quoted, but the text[2] reads *imperans* (the similar phrase "iubet ea quae facienda sunt" does occur in another passage).[3]

Now Cicero was never esteemed an authority in the Common Law, but that is no reason why we should leave him under suspicion of having written nonsense, or something dangerously like it. Many readers of Cicero and other Latin authors (or retailers of fragments from them) forget that words often have much more definite implications in classical Latin than their nearest English equivalents will carry. The conception at the root of the word *lex* in all its uses is that of willed design, whether the designer be a God, or a legislator, or the framer of an express condition in a private transaction, as in the very common phrase "ea lege." It is hardly too much to say that the primary content of the word is the reason or intention of him who prescribes a rule rather than the matter prescribed. Therefore Cicero's dictum, even when torn from the context, does not mean that legal ordinances, as formulated, purport to cover the field of morals. Its point is something very different and much more reasonable, namely that, so far as legal precepts positively command anything to be done, their ultimate justification is the authors' conviction that what they command is politically and morally right. But let us take a step farther and look at the context ("Phil.," XI, xii, 28). What is Cicero talking about? Is he engaged in defining terms of art in jurisprudence? Is he dealing with ordinary legal categories? Is he thinking as a lawyer at all? Quite the contrary. He is arguing in the senate as a statesman and defending a formal irregularity by an appeal to the higher law of moral necessity. A commanding officer and provincial governor has acted outside the limits of his command on emergency. What is to be said for him? Here are Cicero's words:

> Qua lege? quo iure? Eo, quod Iuppiter ipse sanxit, ut omnia quae rei publicae salutaria essent legitima et iusta haberentur. Est enim lex nihil aliud nisi recta et a numine deorum tracta ratio, imperans honesta, prohibens contraria. Huic igitur legi paruit Cassius quum est in Syriam profectus, alienam provinciam si homines legibus scriptis uterentur, his vero oppressis suam lege naturae.

Cassius committed an excess of jurisdiction; according to the usual rules of his service, if they are to be applied to the case, it

2. "Phil.," XI, xii.
3. "De legg.," I, vi, 18.

certainly was so. But the situation called for prompt action to redress the violent wrongdoing of a public enemy, and he followed the higher law of righteousness and the common weal. In so doing, Cicero goes on to say, he was only anticipating the certain judgment of the senate, as both he and Brutus had done in like cases before. Compare the sentence a little earlier, xi. 27: "Nec enim nunc primum aut Brutus aut Cassius salutem libertatemque patriae legem sanctissimam et morem optimum iudicavit." Nothing could be more widely removed from the sphere of common official or judicial usage, not to speak of technical definition. We may note by the way that there is nothing specially medieval, or "monkish," as our great grandfathers used to say, in the scholastic doctrine which reckoned the law of nature as a branch of divine law. It is in exact accordance with the original classical significance of natural law as declared by Cicero. The soundness of Cicero's opinion, as applying to the special circumstances, does not concern us here; but it appears that the senate agreed with him.

The parallel passages already mentioned is in the "De legibus."[4] It is expressly concerned not with the specific contents of any system, but with the law of nature as the ultimate groundwork of all legal institutions: "Penitus ex intima philosophia hauriendam iuris disciplinam putas," as Atticus is made to state Cicero's object. Cicero professes to follow the best authorities, meaning undoubtedly not Roman lawyers, but Greek philosophers.

> Igitur doctissimis viris proficisci placuit a lege: haud scio an recte, si modo, ut iidem definiunt, lex est ratio summa insita in natura quae iubet ea quae facienda sunt prohibetque contraria.

It is plain from the whole context that Cicero regarded the working out of these universal principles in any particular body of laws as belonging to a quite different order of discussion; and the fact that he was neither an original philosopher nor a profound lawyer does not make him less competent as an expounder of the views accepted by the leading members of both faculties. To represent him as capable of the sort of confusion between the ultimate standards of jurisprudence and the actual contents of legal systems which is too common in modern books would be to talk mere nonsense. The passage in "De legibus" is earlier than that in the Philippic, but, as it occurs in a literary and theoretical work, is probably more considered. In any case there is no substantial difference. We have seen that the current quotation does not ac-

4. I, vi, 18.

curately represent either. But we must not be tempted farther towards putting a juristic sickle into the harvest of Ciceronian scholarship.

II

Horace has been even more scurvily treated than Cicero. In his Epistles[5] he gives about fifty lines to warning a friend how foolish it is to be moved by the praise or blame of the ignorant, and especially to court their praise. The passage being too long to quote in full, I must give in short so much of the sense as needful. Whom do we deem a righteous man? Horace asks. An answer follows, not Horace's own, but that of an ordinary, rather careless person; Munro judiciously printed it within quotation marks, "Why, such an one as observes the laws, arbitrates in heavy cases, is good for security and witness." Indeed! replies Horace, a man may be all this while his family and neighbors know him for a rogue that keeps on the windy side of the law, no better than a slave who eschews theft and murder for fear of the whip and the gallows; a fellow whose real prayer is whispered to his dear Laverna, patroness of crooks, while his audible voice is worshipping Janus or Apollo. Such is Horace's own mind. The moral is plain enough and to spare; Horace points it elsewhere when he says that enactments without good customs avail nothing to curb the reckless pursuit of gain:

> Quid leges sine moribus
> vanae proficiunt . . . . ?[6]

It seems hardly credible that the words

> . . . vir bonus est quis?
> qui consulta patrum, qui leges iuraque servat,

should have been cut out of their satirical context to pass as a platitude which moreover is a false one by Horace's careful showing. Yet it has happened. The fragment may be seen figuring in this lamentable plight on the title-pages of eighteenth century reporters, two or three of them if I mistake not; and any layman who notes the blunder may think, if he is a scholar, that such is lawyers' scholarship, and, whether he is a scholar or not, that our profession recognizes no morality beyond legality. To assert this as the general habit of lawyers or anything like it would be defamation, but I fear

5. I, xvi.
6. C. iii, 24.

excusable, or at least giving little hope of substantial damages, by reason of the literary stupidity which invited misunderstanding.

It must be confessed, unfortunately, that a particular kind of uncritical slovenliness in matters outside professional skill and practice is so frequent among inferior lawyers as to be the common badge of their quality. Not that even successful ones who rose to high places have always been exempt from it. Lord Campbell's lively but wholly untrustworthy biographies are a notorious example. "The lawyer brings to historical research a sense of evidence and a power of testing it;" so said the Master of Balliol ten years ago, when he was just Mr. A. L. Smith, a well-known Oxford tutor. Of Maitland, his immediate subject, this and much more was true, but as a general compliment to the profession it is, with all respect for the Master of Balliol, a hoary fallacy. Some of the worst nonsense I have met with about historical evidence was written by respectable lawyers from Coke downwards.

More than this, it is not enough to say that a body of law is not a complete system of precepts for the conduct of life. So far as its field coincides with that of ethics, its contents must be conformable to the received precepts of social morality, but it is not itself a system of precepts at all. Its business is not to give lessons in conduct, but to keep the peace and settle or prevent disputes; and not the less so because the amount of ethical rule embodied in positive law has increased largely in modern times and is still increasing.[7] The moral sense of the community, including therein, of course, that of lawyers, but not as anything different from that of other reasonable citizens, tells us what reasonable men expect of each other in the business of life. Courts and legislatures tell us how much of those expectations will be reinforced by public authority. They also prescribe the various ways and forms in which this shall be done; and that part of their task, as lawyers know, presents infinite difficulties and complexity, together with most dangerous possibilities of doing more harm than good with the best intentions; but of such things very few laymen have anything like an adequate conception.

III

Another thing overlooked by most laymen is the vast bulk of modern law dealing with matters of public order for which a rule of some kind is wanted, but, until the rule is made by competent

7. See *Ames'* essay on "Law and Morals" in "Lectures on Legal History."

authority, it is indifferent from an ethical point of view what it shall be. There is no cause for surprise if different or opposite rules are laid down for such matters in different jurisdictions, though in some cases it might be convenient to procure general uniformity by international agreement. In private law, too, there are many points of detail evidently calling for a settled rule, but such that no one solution can easily be said to be in itself more just or convenient than another. The assumption that there must be one and only one intrinsically right way of dealing with any practical question is often tacitly made, to the hindrance of rational agreement. Its fallacy is evident to any one who has learned the distinction between natural and conventional justice; but that distinction itself, so far from being familiar to laymen, has been ignored and even despised by learned persons who should have known better. Certainly no man is like to become wise by presuming that Aristotle was a fool—but some teachers who enjoyed high repute in the nineteenth century talked as if that was their expectation. Lay people suppose that every legal problem is like a simple equation; whereas the problems of the political sciences, not excluding law, not seldom are more like equations of higher degrees in being capable of two or more solutions.

Yet it must be allowed that the lay people are not without excuse in confounding the judge's office with the moralist's. For the law of the courts, though it cannot embrace the whole of morality, can exercise appreciable influence on moral standards within certain limits and under certain conditions; and those conditions are nowadays to be found in many jurisdictions, and perhaps are wholly wanting in few or none that need be considered. In a jurisdiction of moderate extent and homogeneous population, whose laws have never been affected by foreign conquest, it is generally true that positive law will only reflect current moral opinion. In such a commonwealth the embodiment of such opinion and practice in formulated law can only furnish a conservative element at times when there is danger of relaxation. Even so, the moral standard assumed by judges and legislators will probably be the standard of the better sort of men and somewhat, though not very much, above the average level of common practice. But in modern societies the case is not often so simple. Ethical feeling and judgment are not uniform throughout a complex and specialized community, but vary accordingly to the education, surroundings, and pursuits of different social groups as soon as one passes from the rudimentary principles to their application. A Quaker's rules are or were stricter

in some ways than an Anglican's; but if an Anglican divine is a Quaker merchant's customer he may (or in Charles Lamb's time might) find that the Quaker's morality in the things of his trade is of a mercantile quality which his own views of strict good faith will not pass as reaching the mark of the highest Christian ethics; and there was a time when John Bright, a member of the Society of Friends and full of philanthropic zeal, was obtuse in the matter of the Factory Acts.

Now the law, standing detached from mercantile and other class interests, will probably maintain in such cases a standard of requirement in matters of good faith and the like, at least as high as that of right-minded citizens outside the interest for the time being in question, and therefore higher than the standard accepted by most persons within it. Notoriously this is so as regards various usages of trade which the law disapproves and the traders with few exceptions declare to be not only harmless, but necessary for the conduct of their business. How far the traders may be right in particular cases is not a question material here. In some cases it is certain that the zeal of the court for perfect justice carried it so far as to make impracticable demands on plain men's knowledge and diligence, though not in matters of commerce. Old English practitioners can remember the time when the court of chancery judged trustees, who are usually no wiser, save as years may bring wisdom, than their cestuis que trust, by a standard of infallible omniscience and impeccable vigilance which probably no chancellor or master of the rolls ever attained in his own person. The result was not that trustees became infallible, but that Parliament intervened to make it possible for a man of ordinary prudence to accept a trust. But on the whole the guardianship of class morality and custom by a central power representing the best mind of the Commonwealth has been effectual and profitable. The lawyers alone would never have made a law merchant at all, but lawyers and merchants together have made a far better one than merchants without lawyers would have made. Consider for example what our law of agency is, and what it would have been if divers arguments for laxer construction of an agent's duties, maintained in quite good faith for all that appears, had prevailed. At this day there is no difficulty in finding among the decisions reported from month to month ample proof of practices being approved or tolerated among traders which will not pass uncensured in a court of justice.

The layman—if a layman should overhear us—may well ask upon this: If the law keeps commercial morality in order, who

looks after the professional morality of lawyers themselves? A question certainly deserving answer, but not likely to receive a short one, for the answer is spread over the whole history of the profession. No sooner were courts and judicature established, whether at Rome or at Westminster, and advocacy recognized as a profession, than it was also recognized that the profession of assisting men to seek or defend their just rights was legitimate only on condition of not becoming a mere trade. The practitioners of the Roman and of the Common Law guarded themselves and their successors by traditional and extremely stringent rules, different in details but aiming at the same objects by fundamentally similar means. If these rules do not, like some of those which the medical profession has imposed on itself, go back to Hippocrates, their severity at least has nothing to lose by the comparison. Not that lawyers are by nature much more virtuous and self-restraining than other men; but they have known well from the first that a strict and even austere professional discipline is the price of public confidence.

There are special conditions, moreover, and they are becoming more frequent in recent times, under which contact with a foreign system of law may have material effects on some parts of social conduct, and thereby, in the long run, on moral standards.

The greatest example of this process may be seen in India, where before the days of British rule there were divers and many customs of religions, castes, and even families, and each religion had its own schools of learned commentators, but there was not much general law of any kind and practically no commercial law. Within living memory, systematic legislation has introduced codified and more or less simplified versions of English law in several of its branches. These codes, or some of them, have also been adopted in some Indian protected states and in several colonies and protectorates beyond India. In this way not only the rules of the Common Law, but the standards of conduct implied therein, come to Asiatic and African people (for they have gone as far as the Sudan) speaking with authority, and the Anglo-Indian codes exercise a distinct ethical influence whose results are only beginning to appear. I have no doubt that French law is doing the same in the north of Africa. The process is of great interest to the student of social development and of what the philologists call, in no vituperative sense, "contamination." But such facts are a long way from justifying any expectation that even when it goes on a missionary

journey, much less in its native air, any system of law should do the work of a complete moral schoolmaster.

Peradventure it is better for us if the lay people expect too much edification at our hands than if they regard the law of the land as a mere collection of arbitrary commands and prohibitions unrelated to any rational or ethical principle, which, it is to be feared, some of them do. This last delusion was rather fostered by the dogmatic (but by no means accurate) school of legal philosophy which prevailed in England in my youth. A similar doctrine has apparently made some way among German publicists of late years; it is of a piece with the Prussian theory of the infallible state whose iron has entered deep into the German soul, to be purged away only at the cost of blood and iron untold. Hereupon we might ride off on vigorous denunciation of the German heresy, and so escape from examining our own conscience; but I do not propose to take that course. I conceive this is a case where practicing lawyers, being familiar with the necessity of certain distinctions, assume and act upon them without making them explicit; and the result is to lay a trap for studious amateurs. We declare that law, whatever it is, must at least not be arbitrary, which is true, first, in the sense that justice must be administered without capricious preferences, truly and indifferently as the old form of oath goes; and next, that the substance of the law must hang together somehow and not be a mere heap of isolated rules. Many persons might, perhaps, suppose that denying law to be arbitrary is the same thing as affirming it to be made or controlled by some kind of popular government. But this is matter of politics, not of law. There was no popular voice in Justinian's consolidation of the Roman law, nor in the making of the Napoleonic codes; none in that of the Anglo-Indian Codes, except that the government of India made them in the exercise of powers conferred by the Parliament of the United Kingdom; not much in that of the German Codes, of which the Civil Code is the latest, although they were passed by the Reichstag. Yet, nobody would affirm that any of these codifications was other than an honest endeavor to lay down just and impartial rules; and few competent persons would deny that, although none of them is free from shortcomings, on the whole they have all achieved good results. Even an amateur politician can see this; but whent it comes to detail, he is apt to demand a scientific reason for every jot and tittle of the law, and talk of arbitrary technicality whenever lawyers fail to produce a reason obvious to his own understanding.

Now, just because civilized law must aim at consistency, and must be a work of art, there may often be a good reason which only lawyers can appreciate. Few laymen look beyond the first impression of the particular case. Then, as has already been observed, there are the cases in which it is easy to show that some rule is needful, but impossible or very difficult to prove that the rule actually preferred is better than any other. Here again there may be reasons of harmony with other parts of the law and settled rules (though such harmonies are too often neglected in current legislation), which an untrained mind is not capable of apprehending. But there are also many cases in which it really matters very little what the rule is, if only it is certain and not unreasonable. If lawyers would oftener have the courage to say so, the lay people might be the better for it. Sticking at such details obscures the general view. The fact remains that law, on the whole, expresses the common conscience of those who are subject to it. If it did not, it would not be obeyed, at least in a free country. Not that it can exactly keep pace with public opinion; sometimes it lags behind, sometimes it is in advance. When an enlightened minority complains, as often it does with justice, of matters requiring amendment that have too long been left unamended, it will almost invariably be found that the public do not really care. Either prejudice or pure ignorance may account for this.

The false conception of law merely under the form of prohibition is largely due to the exaggerated prominence of criminal law in the public eye. To nine lay folk out of ten the word "court" suggests a police-court first, and to some of them nothing else at any time. Merchants and special jurymen know better, but they are a minority. Now the criminalist point of view is wholly inadequate. "Thou shalt not" is well enough to clear the ground, but "Ita ius esto" must be the builder. The present is in some ways a good time for making people see that law does really build, even if part of the demonstration is painful—I mean the sight of the ruin left by the tread of the Prussian hoof wherever it has passed.

IV

Perhaps the greatest of all the fallacies entertained by lay people about the law is one which, though seldom expressed in terms, an observant lawyer may quite commonly find lurking not far below the surface. This is that the business of a court of justice is to discover the truth. Its real business is to pronounce upon the justice

of particular claims, and incidentally to test the truth of the assertions of fact made in support of the claim in law, provided that those assertions are relevant in law to the establishment of the desired conclusion; and this is by no means the same thing. The difference holds good, in our system, even in criminal procedure. John Doe is found dead in suspicious circumstances. It is not for any ordinary court of justice, but for the police, or for a coroner's inquest, which has no power to render any definitive judgment at all, to find out whether John Doe was killed, and to whom suspicion points. On the information of the executive, the state's attorney prosecutes Richard Roe for the murder of John Doe. The Commonwealth is in the position of a plaintiff, and must prove its case as much as any other plaintiff; indeed a little more, the addition to the proof required in a civil court being expressed in the current formula "beyond reasonable doubt." And if the jury is not satisfied that Richard Roe killed John Doe, the court will not, indeed, may not, conjecture in public who then did kill him.

If a contradictor is minded to search for a more plausible appearance of inquisitorial procedure, as we now commonly say, in our courts, he may find it in the quarter most remote from criminal law, namely the administrative operations of a court of equity. Here the court seems to take the superintendence of deceased persons' estates into its own hand in masterful, or at any rate, paternal fashion, putting things to rights all round, ascertaining what are the claims of a score or more, it may be, of different persons, and the means of satisfying them, and finally allotting to every claimant his rightful share or so much of it as the estate will satisfy in a due proportion. Certainly this is not much like the plain and single-acting function of justice in an action for goods sold and delivered. But the essential feature of litigation is there. The court is moved to action only by the claim of a definite person or group of persons in the same interest, a claim which cannot be justly satisfied without dealing with other claims also; nor does the court, even here, profess to assist those who do not assert their rights.[8] However, the English court of chancery had a tender conscience in the matter of being quite sure that all proper parties were before it, and therefore directed elaborate inquiries with intentions almost too good for this world. What with meticulous procedure, and (it must be said) Lord Eldon's proneness to hesitation and delay which dominated the court for many years, a chancery suit

8. See *Langdell's* "Brief Survey of Equity Jurisdiction," art. vii.

became the synonym of hope deferred without limit, and such legends arose as the lay people read, and probably believe, in "Bleak House." Contrariwise the catastrophe of that story, as framed by Dickens, makes an enormous demand on lay readers' credulity by ascribing miraculous powers of summary decision to this very court. A missing will is discovered, and the discovery puts an end to the suit with a swiftness that certainly seems to throw us back to patriarchal justice. Every tyro in equity practice knows that the only immediate effect must have been to add one or more parties to the suit. In fairness to Dickens, however, it must be observed that the scene in court is judiciously not described; we are told only so much as was picked up by a quite unlearned young person outside. "Esther's narrative" may be compatible, on strict examination, with *Jarndyce* v. *Jarndyce* having been adjourned and then settled among the parties, a process which would be hastened by the discovery that the estate had vanished in costs. If so, Dickens might plausibly maintain that he did not exceed the usual license of novelists in compressing minor incidents and omitting details that are necessary in fact, but only tedious in a story.

Our tyro, being flushed with new learning, and not having digested the precept to suffer fools gladly, would probably reject any such compromise and protest that the legal credulity of laymen is even more omnivorous than the historical credulity of Sir Edward Coke, and it is impossible to explain anything to them. But he would be wrong. The unlucky truth is that most lay people, for one bad reason or another, believe all law to be so absurd that no statement whatever about it is too absurd to be credible; and they know no better because lawyers have taken so little pains to enlighten them. Our art, like all arts and sciences, must have its proper terms, which can be understood only by training and rightly used only with trained experience. But there is no reason why its broad principles and even much of its particular application should not be set forth in language intelligible to all educated men; and so far as we lawyers fail to do this in a democratic age, we shall have ourselves to thank for any ill consequences.

THE LATEST PHASE IN LEGAL EVOLUTION

By W. Jethro Brown[1]

The goal of social evolution is the substitution of justice according to law in the place of force and caprice as the controlling factor in human relations. The attainment of the goal implies, normally at least, a process in the course of which man passes through the stage of self-help to voluntary arbitration, and again on to compulsory governance by courts. In each stage of this process, custom, usage, habits, and the current ideas of morality or religion are potent factors in the determination of human relations. But such factors, either with respect to their meaning or with respect to their enforcement, are normally vague, capricious, and uncertain in the earlier phases of social evolution. Hence the ever expanding range of compulsory governance by courts.

The process is subject to limitations, some of which are imposed by the enduring nature of things, whilst others are imposed by circumstances of time or place, or the degree of civilization attained by a particular society. As an illustration of the former, one may take the case of such an injunction as "Thou shalt not think ill of thy neighbor." It is impossible to conceive of a society endeavoring to bring within the scope of legal relations the subject of kind thought for others. On the other hand, there are large classes of legal relations which, though at a particular time or place thought to be essentially and eternally outside the scope of law, have subsequently been brought within its range, as progress in organization and ideas, or as the necessities of practical life, have dictated.

I will give three familiar examples. The early common law was evolved largely out of the minds of judges (who were of course influenced by custom, habits, and ideas of justice generally prevailing). But, however influenced, the judges did, as a matter of fact, bring under the rule of law large classes of human relations previously regarded as properly and eternally within the province of self-help. When common law became stereotyped, equity took

1. [The author is president of the Industrial Court of South Australia and professor of law at the University of Adelaide. He is author of the well-known treatise "The Austinian Theory of Law" (1906); "The Underlying Principles of Modern Legislation" (1912); and of various other contributions in the field of general jurisprudence.—Ed.]

up the running. In our own times, legislators have passed innumerable statutes, not only making more definite an existing legal code, but adding to, or qualifying, an ancient code, in accordance with the growing needs and aspirations of progressive communities. Again, it seems within the region of possibility, if not probability, that there will be a significant addition to the sphere of legally controlled relations after this war with respect to civilized communities inter se. Publicists have long discussed the question whether international law was law at all. In my essay on "The Austinian Theory of Law" I have described it as law in the process of becoming. It is not too much to hope that that process will be greatly accelerated by violations of the international code which have been committed in the course of the war. The process, however, will not be complete until the final stage of compulsory settlement by courts is reached—courts which have the power to enforce their decrees by an international police.

In the present article, however, I am mainly thinking of industrial law in the sense of a code of rules which, though necessarily progressive, regulates the relations of employers and employes in the world of industry. Looking at times past, and excepting temporary and experimental periods, industrial relations have been deemed outside the sphere of law. They have been regarded as something to be settled by lockout, strike, collective bargaining, the higgling of the market, supply and demand, etc. But rapid changes in the social structure are going on, and have been going on for some time, tending towards an enlargement of that part of human relations which falls within the control of law. For present purposes, and without being too antiquarian, it is sufficient to refer to the factory legislation associated with the honored name of Lord Shaftsbury. As is well known that legislation, though preeminently humanitarian, was opposed by many leaders of radical opinion of the day. It is more than probable that those leaders foresaw that the factory legislation was but the thin edge of a great wedge, which would be driven home sooner or later, and would involve increasing fetters on human beings in the control of their property. As a matter of fact, in Australia, not to mention other countries, legislation has already provided machinery by Wages Boards and Industrial Courts (which have an original jurisdiction, an appellate jurisdiction from Wages Boards, and a penal jurisdiction in respect to strikes and lockouts). Further, the Industrial Courts, Commonwealth or State, have been employed for some time in evolving a code of industrial law. Obviously, an

industrial court must be consistent (so far as compatible with being progressive) if it is to prove a means of industrial stability. When it gives an award in any particular industry, it expressly or impliedly affirms principles which control its future actions. The time seems not far distant in Australia when we may anticipate a reasonably comprehensive code of law for the governance of industrial relations between employers and employes. The present machinery is imperfect; and it goes without saying that the code of rules evolved is imperfect. But the end of a legally ordered code for the regulation of industrial conditions seems well in sight.

To people of the old world, and even to people of the new trans-Atlantic world, the trend of events in antipodean Australia may seem of little significance. But so far as concerns what I have called "the latest phase in legal evolution," I am of the opinion that the progress of events in Australia is full of significance for civilized communities elsewhere. The conclusion has been forced upon me by certain familiar facts, to some of which I shall make a brief reference.

In the first place, there still exists in all civilized communities the most glaring contrast of riches and poverty. In the second place, there is a weirdly capricious distribution of the national income. I suppose no one hopes for the realization of an ideal distribution of the national income; but the present distribution is so capricious, so dependent on accidents of birth or circumstance, that it embitters social relations, and threatens the very foundations of society. In the third place, there are a variety of forces which one may group under the heading of education (without having too nice a regard of what the term education ought to mean). The general resultant of these forces may be summed by saying that they are antithetical to the classical prayer—

> God bless the squire and his relations,
> And keep us in our proper stations.

In the fourth place, the increase of wealth, of knowledge, and the multiplication of pleasures, have combined to create a condition of unrest—of growing discontent. In the fifth place, certain causes are likely to have a very serious effect, adversely to industrial stability, as a result of post-war problems. For example, the financial strain which must result as a legacy of the war, and the unsettlement of large populations who, having been actually engaged in the war, will find it difficult to return to the relatively humdrum life to which they had been accustomed in pre-war times. Even

among the civilian population who have stayed at home, many post-war problems are likely to create serious and far-reaching difficulties, conspicuously the question of woman labor, the rates of wage for women, and the general conditions of their work.

Alongside the above mentioned facts and prospects, one has to note the growing power of organization, whether of employers or employes, trade unions, trusts, etc. One has also to remember the growing political power of the masses—indeed, I may say, of the wage-earners who constitute the bulk of the population. The wage-earners in Australia have already learned the power which comes of organization. Wage-earners in other lands are also learning the same lesson. I do not venture to predict the wise exercise of the power. I simply note its existence.

It should be apparent that industrial relations have an immensely increasing importance in the life of modern social organism. In my opinion that importance is such as to call for the subjection of these relations to the rule of law. I cannot, when I regard the facts and conditions already mentioned, conceive it possible that communities will for long tolerate the industrial régime which is sometimes called "freedom of contract." It is probable that the bulk of the electors in democratic communities of today would vote for socialism; but, without referring to the theoretical objections to socialism, there are great practical difficulties in introducing socialism without an industrial chaos extending over a long period. Indeed, I think the most intelligent leaders amongst socialists recognize that if socialism is to come at all, it must come by degrees. It is quite possible that what I have called "the latest phase in legal evolution" is a step towards socialism. Certainly it involves a vast extension to the sphere of the state. Wages and conditions of labor generally cannot be fixed in a community with any degree of success unless there is some sort of control over the prices of commodities. Nor ought they to be fixed in a community unless the state assumes large responsibilities, either in the way of protection of industries, or by way of subsidy or bounty. But, whatever the future may have in store, it appears to me to be indisputable that the increasing control by the state of economic or industrial relations is rendered inevitable, and that the evolution of industrial law which has taken place in Australia is a movement likely to be paralleled in other countries. Indeed it is already being paralleled in some.

It is a curious commentary upon the foregoing remarks that compulsory arbitration in Australia finds many opponents both

amongst employers and employes. In both classes may be found individuals who say "Let us return to the strike and the lockout," or to use a common and euphemistic expression "direct action." In both classes, this opposition to the extension of the rule of law to industrial relations arises partly from a belief in the relative strength of capital and labor respectively. But it also arises partly from beliefs which are less easy to understand or justify. Some employers dread the process of socialization; some employes fear lest the present process of civilization should interfere with or delay the introduction of socialism. It would not be difficult to show with regard to individuals in both classes that there is in general a failure to look all round the existing facts—facts which, whether we like them or not, will determine the course of the future. There is also a failure to put the interests of the community *first*. Hence often a strange juggling with the individual or class conscience.

I do not pretend that "the latest phase in legal evolution" is the final and complete solution of the "social problem." If there is to be even a reasonably approximate solution, it will be necessary that there should be a co-operation of many agencies, both public and private. There must be improved machinery for the evolution of industrial law. There must be legislative action as regards taxation, distribution of wealth, bequests, etc., etc. There must be administrative action dealing especially with such problems as social insurance and unemployment. There must be, in private relations, more of co-operation, and less of recrimination, between employer and employe. There must in fact be a change of heart and outlook on the part of the modern citizen. I fear there is only too much truth in the censure of a popular novelist who said the other day, "Wealth is our God; not knowledge or wisdom: a fact which shows that the real essence of Christianity has not permeated human society."

"The latest phase in legal evolution" is likely to prove an enduring contribution to social well-being on condition of the co-operation of supplementary agencies suggested. If there be such a co-operation, then I am inclined to think that there will be no call for socialism. But failing such co-operation, though I do not think socialism an ideal organization of society, I regard it as inevitable—inevitable notwithstanding all its defects, and though it has to be won through the loss of much that we hold dear, the loss of much that is good, and though it takes generations of strife to realize it. I believe

that both employer and employe have to gain by co-operation in making a success of the latest phase of legal evolution. I am hopeful (though not convinced) that the fact will be realized before it is too late.

Two implications of the extension of the rule of law to industrial relations deserve mention. In the first place, that extension does not mean industrial slavery. The employer who does not choose to continue his business, either because it does not pay, or for other just reason, may shut down. An employe, if he does not care for a particular employer, may change his employer; or he may change his employment. But the employer may not use the lockout as a means to enforce his own ideas of proper conditions of work; nor can an employe strike with the object of imposing upon the employer his ideas as to the proper conditions of work.

In the second place, the extension of the rule of law to industrial relations is not here advocated as having been, or as being, the quickest way for either employers or employes to get what they may happen to want. I advocate the extension on other grounds. I do not say that strikes in the past have not fulfilled a useful function. Nor do I say that at a *particular* time in a *particular* industry the workers may not get more easily what they want by strike than by law. I am looking at the system in the interests of society as a whole, and more especially the interests of the employes as a whole. Of course, in the old days it may have been easy for the strong man to get what he wanted. That did not mean necessarily that he was entitled to it, or that the system under which he lived was entitled to be considered civilized. The same remark applies either to the lockout or the strike. I am afraid it is seldom realized, amongst either employers or employes, how wide is the gulf between the particular and the general, between particular industries and industry at large, or how vital in the interests of all classes is the reign of law as distinct from the dominance of unregulated force. This may seem commonplace enough, yet, as a matter of fact, it is not generally accepted. Neither the employer nor the employe can have it both ways—their deepest and abiding interests are in the direction of industrial law and order as distinct from industrial anarchy. That is what I meant when I said that I feared there were many people who failed to distinguish between the particular and the general. In any particular case, an employer or an employe who believes himself to be under an injustice must not only consider his particular case and its circumstances. He must also consider the welfare of

the class to which he belongs, and that welfare in the long run; and he must again consider society. If he neglects to do so, and resorts to force in derision of the law, if law there be, he is not only a disloyal citizen; he betrays the real and abiding interests of his class and society; and his betrayal is none the less dangerous because he is actuated by what he believes to be good motives, or because he does evil in the hope that good may come.

NEW CONCEPTION AND NEW BASES OF LEGAL PHILOSOPHY

By Alejandro Alvarez[1]

We are passing through one of the greatest and most critical periods of history. We are witnessing in effect not only the demolition of Europe, but also an alteration of the social order, as well as a transformation of thought, of doctrines, of beliefs.

If the whole world perceives the upheaval of material things and yields attention solely to that phase of the great catastrophe, yet the changes in process in social life and in the realm of ideas, while less manifest, are not less profound.

From these points of view we may compare the events of the present with those of the French Revolution. In neither case was the overthrow of the existing order the direct object sought, but these events themselves were products of defects of that order, and later the necessity was seen of abandoning the old régime and of establishing a new order of things. After 1789, the movement in France and in other countries was toward the establishment of national life on a basis of *individualism*, proclaimed by the philosophers of the eighteenth century, precursors of the Revolution, and consecrated by it. Individualism is the exaltation of human personality considered as the final purpose of society, and as the endowment of fundamental and inherent rights; and the mission of the state is to assure the protection of these rights and to avoid their infringement as far as possible, by concerning itself little or

1. [Doctor en Droit of the University of Paris; Diplomé of École des Sciences Politiques; former professor of Comparative Civil Law, University of Santiago, Chile; former Counselor to Ministère des Affaires Étrangères (Chile); délégué à la quatrième Conférence Panaméricaine; Associé de l' Institut de droit international; Secretary General of Institut Américain de droit international (Washington). Dr. Alvarez has written many books in the fields of jurisprudence, comparative law, civil law, and international law, and he is widely known in American university circles by reason of his lectures on international law given at the request of the Carnegie Endowment. His first literary introduction to an American audience was through a translation of his notable book "Une Nouvelle Conception des Études Juridiques et de la Codification du Droit Civil" (Paris, 1904) in the Modern Legal Philosophy Series, Vol. IX: "Science of Legal Method" (Boston, 1917), pp. 429-497. Other parts of the same work have been translated and incorporated in the Continental Legal History Series, Vol. XI: "Progress of Continental Law in the 19th Century," Boston, 1918.—Ed.]

not at all with measures for the general interest. The people were not ready for this change in the social system, and in consequence the transition was long and anarchic. The co-operative system which will follow the present epoch is one which, little by little, has been becoming established in the course of the last hundred years. It is accepted and proved; it lacks only the reception of a definitive confirmation. The transition accordingly will be brief and free from upheaval. In other words, the régime which followed 1789 was established by revolution; the one which is to follow will be a product of evolution.

I

A curious intellectual phenomenon appeared in the course of the last century, which it is necessary to point out, because of its capital importance for the future of political sciences, and, especially, for the philosophy of law.

In the eighteenth century there were two great currents of philosophical doctrine: The French social and political philosophy, represented by Montesquieu, Rousseau, and Voltaire; and the German moral and legal philosophy of Kant and Fichte. The French philosophers drew the outlines of the contemporary state, proclaiming along with individualism, respect for private ownership, national sovereignty, separation of state powers, and the principle of a written constitution. But in exalting the rights of the individual they neglected his duties. The German thinkers sought to establish a doctrine of morals and another of law. Kant was the philosopher who exercised the greatest influence not only in Germany, but over the whole world. He was the first to give morals a basis other than the Christian religion. The primary characteristic of his philosophy is that he united politics and law and connected the latter with morals. The French philosophy and the German philosophy of the eighteenth century far from being in opposition are, on the contrary, mutually complementary; and they had the same origin in the speculations on human nature.

Different circumstances, notably, national interests, racial disposition, geographical situation, divergent legal systems, and other causes, in the course of the nineteenth century led to the fact that the conceptions of philosophy, law, politics, and international relations as well as other manifestations of culture (the economic sciences, education, liberal arts, etc.) assumed a special physiognomy in three great groups of countries and brought into being as many

schools—France and other Latin countries of Europe and America; England and the United States; Germany, Austria, and other Saxon countries.

Without attempting an analysis in detail we may say that the conception of law in Germany, from the metaphysical substrate which it had in the eighteenth century, became fused for some jurists with the idea of force in the nineteenth century, and was considered by them simply as one of its forms. In France the same conception is more idealistic, and in the Anglo-Saxon group it has an essentially positive character. These divergences are manifest when we compare the civil law of these three groups of countries. The same is true also on inspection of the public law—the ideas of the nature of the state and its qualities, of individual rights and guaranties, of national sovereignty, of the separation of political powers, of democracy, of liberty, equality, and of various other things, are different in these three groups. The same divergences are found in matters that concern international relations. In public law and in international law there is also a Pan-American school logically consequent on the solidarity of the states of the new world and the special conditions under which they have developed.

Moreover, the political and social sciences in spite of their undeniable progress suffer a triple defect. First of all, they lack Americanization. European publicists, little acquainted with the American continent and its special situation, have studied only the problems, necessities, and doctrines of their own continent and have built on their reflections, political and social sciences; and we, except in certain political and international matters, have followed the doctrines of these publicists, which have caused more than one difficulty in our internal affairs. Again, the progressive transition in the nineteenth century from the individualist régime to that of solidarity or co-operation gave place in the sciences mentioned to an eclecticism which, while it was a faithful reflection of the life of the epoch, nevertheless was not sufficiently taken into account. This occasioned a certain amount of confusion which was aggravated by the diversity of methods of study, because the conclusions arrived at differed according to the method employed. The methods used in the political and social sciences in the nineteenth century were the deductive, metaphysical, or a priori; the inductive or observational, also called the historical and comparative; the physiological; the psychological; the sociological; and the teleological.

A number of thinkers, notably Fouillée and Renouvier, have sought to provide for greater uniformity in the social sciences by resort to philosophical doctrines grounded on eclecticism, but without result.[2] In France, in Italy, and also in the United States[3] there has appeared in recent years an important movement to discover the scientific basis of social problems especially so far as concerns the philosophy of law.[4] After the war, a renovation will be necessary not only of national and international life, but also of the related political and social sciences. This task will chiefly belong to the men of science and to the universities.

The intellectuals of Germany certainly will encounter difficulty in showing that their idea of "Kultur" should be accepted everywhere for the future. It will lie with the scholars of occidental Europe and of the American continent to take an inventory of the doctrines and institutions of their several countries. A struggle, an intellectual battle, will follow the war. This contest of ideas will result in great benefits if it will be possible to avoid prejudice and passion. We should, therefore, begin now to prepare for the eventuality.[5]

The best means for reconstruction of the political and social sciences will be to search for new bases in them. And, of these sciences, the philosophy of law in particular stands in need of renovation since it is the most defective and the most discredited.

Let us review briefly what this philosophy has been up to the present time, and let us see what is necessary for its improvement, to make it useful in the future, and what it now lacks in its object and its method of study.

---

2. On the eclectic systems, see *Fouillée*, "La Science sociale contemporaine," p. 379 seq.; *Beudant*, "Le Droit individual et l'État," Paris, 1891, p. 261 seq.; and *Henry Michel*, "L'Idée de l'État," Paris, 1896, Liv. V, ch. iii.

3. In the United States this movement is directed by a committee of the Association of American Law Schools, led by the eminent jurist, Professor John H. Wigmore.

4. The most important of these works have been translated and published in the Modern Legal Philosophy Series (thirteen volumes edited by a committee of American law school professors), and in eleven volumes of the Continental Legal History Series, also edited by a similar committee of the Association of American Law Schools.

5. An eminent professor and publicist of the University of California has remarked with justice that the universities are given over to a fatalism which does not concern itself with the future, especially from the intellectual point of view—*Francis T. Philbrick*, "National Basis for Ultimate International Peace" in Mid-West Quarterly, V, No. 1, 1917.

II

The idea of law has been a constantly changing one. It has passed through diverse periods or phases—metaphysical in antiquity; theological in the middle age; rationalistic in its form of natural law in the seventeenth and eighteenth centuries. In the nineteenth century the concept of law altered according to the method employed in its study; for the historical school it was the product of history; for the sociological school it was the product of society; for the materialists it lacked any ideal content; and for the neo-idealists, on the contrary, law was a kind of natural law but with a positive and evolutive foundation. On the other hand, different surrounding conditions, such as juridical tradition, the sources from which the law was derived and the ideas prevalent as to the factors which determined the creation and development of law, and especially differing ideas of the state, of sovereignty, and of the administration of justice, have resulted in the fact that the concept of law is dissimilar in three groups of countries.

These three groups are:

(1) The Latins with France at the head, who have been under the influence of Roman law, Canon law, natural law, and moral philosophy (ethics). The last two of these influences in their turn have been under the sway of theology.

(2) The Germans under the influence of modified Roman law, of natural law, and of moral philosophy. The last two of these influences are to be understood in the sense of German philosophy.

(3) The Anglo-Saxons, who were almost entirely free from the influence of Canon law and of theology, and little everted either by Roman law or natural law,[6] developed under their own juridical traditions and their own moral philosophy.

There is a very profound difference between the idea of law held by the Anglo-Saxon group on one side and by the Latins and the Germans on the other. We shall make an effort to outline it.

The Latin group and the German group (which we shall combine here for brevity under the name "continental") admit the

6. Concerning the influence of Natural Law, see *Sir Frederick Pollock*, "The Law of Nature." Journal of Comparative Legislation, II, 204-13; ibid., III, 418-33. Cf. *A. S. Thayer*, "Natural Law," Law Quar. Rev., XXI, 60; *J. W. Salmond*, "Law of Nature." Law Quar. Rev., XI, 121. For the influence of natural law in American jurisprudence, see *J. E. Keeler*, "Survival of Natural Rights in Judicial Decisions." Yale Law Jour., V, 14; *C. G. Haines*, "Law of Nature in State and Federal Judicial Decisions," Yale Law Jour., XXV, 617-657.

existence of law beyond the sphere of positive law; that is to say, they accept the existence of jural relations although these relations may not have been validated by the legislator. Formerly these factual relations were evolved out of human nature (natural law); today they are predicated on conscience and public opinion which furnish the elements necessary for their support. These rules, for the rest, are not simply of a moral character, but under the name "principles of justice," they serve to interpret the positive law and to supply the regulations where the positive law is silent. The Anglo-Saxon, on the contrary, thinks of law only in the positive sense as an emanation from a superior authority in the state and which is brought into application through the courts of justice. Purely conceptual law without positive sanction, natural justice, is not regarded as law in the proper sense. But if natural justice as an ideal is wanting in the theoretical and traditional notion of law among the Anglo-Saxons, it still exists, nevertheless, and has exerted an important part in the early development of equity and still has its place in the development of law by the courts.[7] This justice is quite another idea than the old continental natural law; it is derived by the Anglo-Saxon from the juridical conscience of the people and changes with it—a view which in its turn has also come to light in the continental group. This materialistic idea of law is the product of the English philosophy of the eighteenth century; it is the declaration of faith of Blackstone, Bentham, Austin, and the majority of contemporary English jurists.

This difference in the conception of law between the two groups of countries is manifest in juristic terminology. In the continental countries there is a double set of terms in use—"ius," "droit," "derecho," "diritto," "Recht," to designate justice or law in the abstract; and "lex," "loi," "ley," "legge," "Gesetz," to indicate the law established by sovereign authority and the enforcement of which can be claimed before courts of justice. The words "ius," "droit," "Recht," etc., mean also the whole system of positive law; thus one speaks of "civil law," "criminal law," etc. The Anglo-Saxons do not possess a term to differentiate each of these two aspects of law separately. They have only the word "law" which

7. It is interesting to find that notwithstanding the fact that Anglo-Saxon law was little influenced by Roman law, it developed a similar institution and from like causes for supplying the deficiencies and for correcting the defects of the law, in the equity of the chancellor, which gave rise to a system of law, Equity, different from the Common Law and analogous to the Pretorian system in that it was based originally on natural justice. Cf. *Salmond*, "Jurisprudence," 4th ed., 1913, pp. 34-39.

is applicable alike to *a* law as well as the ensemble of positive legal rules,[8] *the* law. This lack of an expression in the Anglo-Saxon group to indicate law in the abstract sense of justice clearly indicates how little is the importance which they attach to it.[9]

From another point of view the complex of positive legal rules is differently regarded in the Anglo-Saxon group and in the continental group. The latter consider positive the law as a system and study it as such. From the ensemble of the law, jurists derive general principles which dominate concrete cases. These principles are different from the principles of law and of natural justice. They serve like general principles of law and of justice to interpret legislation and to develop it in cases not provided for. Besides, the interpretation and development of law in the continental group are always the labor of jurists who are inspired, or ought to be inspired, by social needs. In conformity with these needs they criticize the existing law and the judgments of the courts.

The Anglo-Saxons have another idea of their law. It is regarded by them simply as the totality of particular legal rules which have been acted upon in courts of justice. They have a horror of general principles. For them law is essentially particularist, casuistic, and like the continental idea of criminal law in which no general principles are found applicable to a case not provided for by statute, there are only concrete and specific cases.[10] Anglo-Saxon law has not been developed by jurists, but by the courts. The function of the jurist is limited to following, in the main, at least, the judgments of the courts, and the acceptance of existing rules without criticism, or, at any rate, a minimum of criticism.

Another difference between the two groups is a mechanical one. The law of the continental group is codified; that of the Anglo-Saxons is not. Each of these methods has its advantages and its drawbacks, which have been considered elsewhere at length.[11]

8. To designate law in the abstract, the Anglo-Saxons employ the Latin word *ius* and also the term *equity*. But the latter term is inconvenient because it signifies in addition to natural justice, the complex of rules of civil law recognized in courts of chancery (which originally applied natural justice), and this is the prevailing usage.

9. On the contrary there are two expressions for positive law—the term *law* and also *right*. The latter is employed to indicate a manifestation of positive law; for example, "personal rights," "legal rights," etc.—special expressions which are not found connected with the other term (law), which is employed only to indicate general law.

10. International law shows this influence of civil law. The Anglo-Saxon school of international law derives international law especially from judiciary precedents; it is essentially of a positive and casuistic nature.

11. *Alvarez*, "Une nouvelle Conception des Études Juridiques et de la Codification du Droit Civil," Paris, 1904, première partie, chaps. vii and viii; cf. *Salmond*, "Jurisprudence," 4th ed., 1913, pp. 23-27.

It might also be added that the law of the continental group is cultivated in many places in a cultural spirit, while among the Anglo-Saxons the study of law is or has been chiefly a practical and professional matter.

III

The divergence in the conception of law and justice between the Anglo-Saxon group on one side and the Latin and German group on the other has had its logical repercussion in philosophico-juridical studies. The philosophy of law is not cultivated in all countries as a science in the same way as the other political and social sciences. In the Anglo-Saxon group the only disciplines recognized are those which have a historical or dogmatic character, and to an extent there is admitted a study of the underlying principles of the legal system under the name "jurisprudence." The continental group, on the contrary, apply themselves to the philosophy of law and regard it as a science introducing the student to the spirit of the law itself. Its principal object is to guide the members of the state in the creation of positive law; and its method of study up to the nineteenth century was based on speculation upon human nature and human associations in the light of jural relations. In consequence, philosophy of law has invariably assumed the character of an universal and immutable system—the fixed quality of law itself. A philosophy which is variable, evolutive, or particularistic, that is to say, which is professed only in a certain country or in a group of countries, would be regarded as lacking the qualities of a real philosophy.

Again, the philosophy of law has been approached from a different angle in Germany than in France. In Germany it is derived from or confounded with natural law as it was understood especially by Kant and Hegel. But latterly there has been a reaction among certain philosophers directed to a more positive quality in its study. Attention is also given to the principles which dominate all the departments of positive law, in works which are labeled "juristic encyclopedias," which employ especially the philosophical and historical methods.[12] Lastly, under the name "General Theory of Law" the Germans give not a little consideration to the basic principles of private law, especially those of civil law derived from Roman law as it was in force in Germany before the code, but these

12. One of the best works from this point of view is *Gareis*, "Introduction to the Science of Law": English translation in Modern Legal Philosophy Series, Vol. I, Boston, 1911.

studies were under the influence of the metaphysical philosophy of Kant and Hegel, and afterwards of the historical school.[13]

In France, philosophy of law was long dominated by natural law with which it was often confounded. On account of their empiricism these studies fell into discredit, and they have been abandoned in the law schools. At the end of the nineteenth century a reaction set in which gave philosophy of law a more positive character, especially with the rise of what is called the "renascence of natural law." In France, books under the name "Introduction aux Études du Droit" have the same content as what the English call "jurisprudence," and the Germans, "encyclopedia." Latterly the works of Duguit, Charmont, and Demogue have opened new horizons in these studies.[14] In Italy apart from the solid works of Miraglia, Vanni, Del Vecchio, Carle, and many others, the philosophy of law is cultivated also after the anthropological and sociological methods, and the published works in this field are very numerous. We have elsewhere pointed out the most important of them.[15]

IV

In the second half of the nineteenth century various social factors appeared which tended at once to give the conception of law a new direction and a certain quality of uniformity and universality. This new direction was the complete abandonment of metaphysics, and chiefly of individualism which has dominated the science of law up to the present time, in favor of a more social point of view; that is to say, an attitude more in harmony with the solidarity which these factors themselves required.

From that time a progressive transition commenced in national and international life from the individualist régime to that of co-operation or solidarity—a transition which as we have seen[16] was the cause of anarchy in the political and social sciences. Let us

13. The following works may be specially mentioned: *Savigny*, "Traité du Droit romain" (translated from the German); *Puchta*, "Cursus der Institutionen," of which the introduction containing a survey of law according to the Historical School appears in English translation as part of *Hastie's* "Outlines of the Science of Jurisprudence"; *Dernburg*, "Pandekten"; *Windscheid*, "Lehrbuch des Pandektenrechts." The general part of these works on Roman law is devoted to scientific analysis of the fundamental concepts of law.

14. The most important parts of these works have been incorporated in translation in The Modern Legal Philosophy Series, Vol. VII.

15. Op. cit. translated in The Modern Legal Philosophy Series, Vol. IX: "The Science of Legal Method," Boston, 1917, pp. 430 et seq.

16. Division I of this essay.

examine in outline in what this transition from individualism to solidarity consisted and its effects on the notion of law.

The extraordinary development of industry and commerce, the multiplication and rapidity of means of communication, and the development and spread of ideas have created little by little a mutual interdependence of all countries; none is sufficient unto itself, and each has need of the commerce and the culture of the others. Economic life and human activity have become cosmopolitan. Co-operation has been established in nearly all matters where national interests do not oppose, especially in administrative services, in the institution of international unions (the post, telegraphs, etc.) At the same time there grew up various international associations in all sorts of human activities and interests. Frequent international conferences have been in vogue with the most diverse objects—humanitarian, moral, social, scientific, industrial, etc.—and especially for the creation of international standards in matters subject to legal regulation. The most notable of these international gatherings were the peace conferences at The Hague in 1899 and in 1907, which inaugurated a new epoch in the effort to extend the empire of law and of justice to international relations. The introductory statements of the "Convention for the Pacific Regulation of International Conflicts," subscribed in these conferences, were masterly and complete declarations of the sentiments of peace, of justice, and of fraternity, which then animated the people. The third statement recognized "the solidarity which unites the members of civilized nations."

Lastly, some of the field of private law has become a part of the domain of international law. In this way there has been created an international administrative law, an international commercial law, an international law of labor, etc. The interdependence between foreign nations was so close that the states in a number of cases had given up their pretensions of absolute sovereignty in submitting to limitations demanded by new necessities. At the present moment a close political and economic co-operation, as well as a uniformity of ideas and of international doctrine, has been established among all the countries of each of the two groups, respectively, into which Europe is now divided. This co-operation is directed by delegates of the governments concerned, who meet in periodical conferences. If, as may be hoped, this international co-operation is maintained after the war it will mark an epoch in the history of civilization.

The changes in the internal life of each of the countries have not been less profound. In the course of the nineteenth century, in consequence of great material and moral progress, and notably the development of democracy and socialism, the isolated individual no longer was regarded as the object of society, and the general interest began to prevail over the particular. In considering the attributes of the state, the power to command no longer was emphasized, but rather the performance of a duty, of the social function in the interests of the community. Governments were constrained in solving their problems to arrive at solutions in accord with social solidarity. Democracy and socialism have attained their great expansive force in the nineteenth century because they were not derived from a priori speculations on human nature as was the individualism of the philosophers of the eighteenth century, but from the conditions of social life.

We may now say that individualism has disappeared in the internal affairs of states. The belligerent governments, even the most individualist, as are England and the United States, recognized as soon as they entered the war that they could not face the new situation under this régime, and they accordingly abandoned it and put in its place a régime of state intervention or control for the purpose of developing the needed co-operation. As a result of this intervention, the governments have rapidly extended their powers in a manner hitherto unheard of. They have assumed direction or control of the production and consumption of foods, of instrumentalities of communication, of industries necessary for war, etc., etc., and this increase of state authority has eventuated not by force, but peaceably, with the unanimous consent of the citizens of the various countries. The advantages of this new régime of control or co-operation being manifest, there is reason to believe that it will continue as the definitive social order after the war is ended.

Individualism having already been abolished in national and international life, it is clear that the conception of law and of justice, which until now has been based on it, must be modified to harmonize these ideas with the new situation. What shall be this new conception of law and justice? The same factors or phenomena which led to the elimination of individualism furnish the outline and principal applications of the new idea.

In another place[17] we have examined these factors or phenom-

17. *Alvarez*, op. cit. translated and published in The Continental Legal History Series, Vol. XI: "Progress of Continental Law in the 19th Century," Boston, 1918, pp. 45-64

ena and their effects on law. We content ourselves here with an indication of the chief points. And first of all, an entire division of civil law, the law of the family, has always been regulated and tends more and more to be regulated not by taking into consideration the isolated interests of members of the family, but according to the interest of the family group—as is the case in the rights and duties between parents and children, between spouses, etc.

From another side, an entire division of public law, administrative law, has developed progressively in the last hundred years. For the greater part, administrative law is only the material of civil law, but envisaged from the point of view of the general interest. One has only to consider the limitations on land holding, especially urban land, administrative servitudes, expropriation for public utilities, public services, such as police, hygiene, etc., to be convinced of the correctness of the statement.

Changes of an economic kind have had a threefold effect on civil law. In the first place, they have enlarged the scope of application of private law by developing the old framework of legal ideas and by the creation of a new classification based on other principles. Next, they have broken the unity of the law by enacting in a good many cases a special legislation, and of a nature entirely particular, affecting a single category of persons, the workmen. This legislation was inspired by the interests of the laboring class. Lastly, they have introduced certain elements which have produced the most profound changes. In the present war the belligerent countries have enacted various laws which radically modify the previous law in that they always take into account the general interest in preference to the interest of the individual. The ensemble of this legislation constitutes a "private law for war." There is, therefore, in many matters alongside the civil law and the commercial law applicable in time of peace, a civil law and a commercial law applicable in time of war and entirely of a different character. The new conception of the state and its attributes, the notion of administrative law, that of family law, the ideas which have inspired legislation for the working class, and those which have brought into existence a private law for war—all these movements and ideas are the outlines of the future. The new conception of law is that of a realization of solidarity; that is to say, the regulation of jural relations not in the interest of the individual, but in the interest of society. And this conception ought to dominate not only private law, but international law as well. The first application of this new

conception has been made by the American Institute of International Law. At its first meeting held at Washington in January, 1916, it voted a "Declaration of the Rights and Duties of Nations." The leading principle of this declaration is that it recognizes that the notion of social duty, of solidarity, and of the general interest ought to be the guide, coincident with the limitation of the fundamental rights of states.

The different projects submitted by the Secretary-General of the American Institute for consideration at the meeting held in Havana last year, in view of an impending reconstruction of international law, are inspired by this new conception of right and social duty.

V

The lessons of history and of contemporary life point out what is false in the points of departure which the philosophy of law up to the present time has adopted regarding the origin of law, its objects, its scope, and its nature. With respect to origin, it has been believed that the law has an existence in and of itself, or that it is founded on human nature. Its object has been taken to be the regulation of the conditions of co-existence among individuals; that is to say, taking into account solely the interest of the individual. And, lastly, it has been thought that the law has an universal scope and an invariable nature. If some of the works on philosophy of law of recent years have abandoned some of these points of view, especially the view of the universal and immutable quality of law, they have yet adhered to the two other beliefs above mentioned.

Today, more than ever before, it seems clear that the law is the product of its surroundings. In this setting there is formed a common opinion, a juridical conscience, the resultant of the ideas, the beliefs, the history, and the education of the people, which are generated in social life. Of these ideas some pass into the positive law, and others rest solely in the sphere of public opinion as moral sentiment. This juridical conscience is in perpetual evolution as are all social facts of which it is only the reflection. Thus, for example, slavery, which for many centuries was one of the bases of social life, gave way eventually to the contrary principle of liberty. In the course of the nineteenth century the idea of liberty has changed; from an absolute liberty unrestrained it has altered to a rational liberty limited by the claims of society.

Juridical conscience, or, preferably, public opinion, is then the true source as well of juridical principles as of moral ideas. It governs today all national and international life. In international affairs this public opinion has several different parts or functions: It gives rise to and derogates from juridical rules; it watches over and sanctions their enforcement; it facilitates the interpretation and development of these rules; it exerts a restraint on political immorality of powerful states; it is one of the best guaranties of arbitral judgments; it approves and sanctions acts which have been carried out by force in aid of public opinion; and lastly, it demands and orients reforms in international practice.[18] In private law, public opinion does not have the rôle which it plays in international law, because of the existence of legislative, executive, and juridical powers; but it creates the principles of law and justice, demands the creation and abrogation of legal rules, and directs the interpretation and development of existing rules of law.

The object of law today is the realization of human solidarity —the regulation of the relations of individuals not in conformity to the personal interest of the individuals concerned, but of the general interest of society. The scope of law, at least of its rules, is greater or less, depending on its environment. It is universal in its tendency toward solidarity because in all countries the productive social phenomena are impressing on the law this new doctrine; but in other matters the law differs according to the conditions of the country, racial aptitude, etc.

VI

The future of the studies on law which are called "Philosophy of Law," "General Theory of Law," and by other similar names, must be devoted not to the study of law in itself, but to the various conceptions of law which have flourished, and to the various legal systems which have appeared in history or which now exist. That study must trace out the lines of legal evolution in the course of history; next mark out the diverse conceptions of law which have prevailed in different groups of countries during the nineteenth century, in a comparison of the fundamental institutions of these various groups; and lastly investigate the different social factors which from the second half of the nineteenth century have operated in all countries in a uniform direction toward the inaugura-

18. On the function of public opinion in constitutional law, see *Bryce*, "The American Commonwealth" (French translation, 1912) Vol. III, part iv.

tion of a new legal epoch—the socialization of the law. The latter point is one which needs to be specially emphasized in order to avoid the uncertainty and the confusion of ideas which are found in the present transitional stage from individualism to solidarity.

The object of this new philosophy of law should be the illustration of public opinion giving it a clearer estimate than it has hitherto enjoyed. It will serve also to guide the legislator in the introduction of reforms; and it will be useful to the judge in the interpretation and development of law. But it has still another very important purpose—it should endeavor to make clear in a synthetic treatment of its materials the spirit of public and private law in those countries in which it has special or particular features, to point out the basic characteristics, and to show how these characteristics are the product of history, of philosophical doctrines, and the social milieu. It is only after having developed the subject in this comparative way that one may arrive step by step at a unity of fundamental conceptions, or, at any rate, be able to clarify those ideas as to which there are irreducible divergences, and to show the causes therefor.

An investigation of the lines of development of the law in the past, in the present, and with an orientation of the future requires an appropriate method. This method should be historical and comparative and should be supplemented by observation of contemporary life. A true philosophy of law is possible only when it is based on a judicious investigation of institutions athwart the ranges of time and space, and the influences bearing on them through surrounding social phenomena.[19] It is only upon this condition that juridical life can be really understood, with its enchainment of influences, their successive modification, the relations of cause and effect which bind them together, and their governing law.

In the present fateful hour it is especially desirable to observe the new orientation which the war has stamped on social life. It has been already a fertile source of instruction because it has put existing institutions to a hard test of their advantages and defects. It has animated human thought, causing the abandonment of prejudices and of traditional ideas, and the searching for new solutions. Special attention should be given to public opinion which now more than ever before plays a preponderant part in political

19. In this connection reference may be made to a three-volume compilation of readings under the title "Evolution of Law Series" made by John H. Wigmore and Albert Kocourek, professors of law in Northwestern University.

affairs, and demands with energy the practical realization of its ideals. With a new outlook, with a program that is positive, practical, and within reach of the entire world, all the causes of discredit and confusion which hitherto have prevailed in the philosophy of law will disappear, and the new phase of law, the social phase as a substitute for the ancient individualism, will appear as the obvious solution for the attainment of its practical objects.

PART II

COMPARATIVE LAW

SOME CURIOSITIES OF INTERNATIONAL MARRIAGE LAW

By J. W. Brodie-Innes[1]

Of all the subjects of international jurisprudence there is not one that makes such romantic and dramatic appeal to the imagination as the laws relating to marriage; there is not one that enters so closely into actual life and experience, and probably there is not one that shows such a wide diversity. Even between England and Scotland the history of the differences in the law, and the examples of decided cases might well fill a goodly volume, in spite of the close relation of the two countries, and the centuries of gradual assimilation of the laws. Each country clings tenaciously to its own system, and the literature abounds with instances of the variations, which have been a happy hunting-ground for play writers and novelists, in multitudes of works ranging from serious complications to broad farce. The mind goes back to the old days of Gretna Green elopements, with all the regulation incidents of the flying postchaise bearing the adventurous couple, the angry parent in pursuit, the sympathetic postboys, the abstracted lynchpin, and the arrival just too late, when the blacksmith had securely tied the knot. But of all those who talk glibly of those old days there are few probably

1. [John William Brodie-Innes (of Milton Brodie) was born at Downe in Kent, 1848. His education was received at Bradfield (near Reading), the University of Bonn, St. John's College, Cambridge (B. A., 1871, mathematical tripos, and LL. M., 1872, law tripos), King's College, London, and Edinburgh University. He was called to the English Bar, Lincoln's Inn, in 1878, and admitted as a Scots advocate in 1888. Among his writings are the following: *Law:* "Comparative Principles of the Laws of England and Scotland"; "The Commercial Law of Scotland" (in "Encyclopædia of the Commercial Laws of the World.") *Miscellaneous*: "The Old House in the Canongate"; "Morag the Seal"; "Old as the World"; "For the Soul of a Witch"; "The Devil's Mistress"; "The Tragedy of an Indiscretion"; "The True Church of Christ"; "Legends of Leading Cases"; "The Golden Rope." He is an authority in cases involving distinctions between English and Scots law, and is one of the few lawyers who has successfully carried on practice in England and in Scotland simultaneously.—Ed.]

who could intelligently answer the questions—why Gretna Green? and why a blacksmith? Earlier again the Fleet marriages supply a mine of romance and broad comedy, set against a background of dingy squalor, which has inspired the pens of many writers, and is far from being exhausted yet.

The divergencies and peculiarities of American marriage law, in spite of the learned treatise of Mr. Bishop, are commonly regarded in Europe as an insoluble mystery, and much the same may be said of most European countries in the eyes of each other. Not very long since it was gravely remarked in a British court of law that it is often difficult to tell whether one is married or not in one's own country, and only a professional expert can tell what may be the case in any other.

But why should such divergencies exist regarding the most important, the most intimate, and the most universal of human relationships? Historians and philosophers have tried to trace the origins of the differences and have groped back into the dim story of primitive man. Some even exploring beyond humanity into the animal and vegetable kingdoms, only to find the same ever-eluding divergencies, conclude that these are innate in the very principle of life itself, and law, with somewhat halting steps, has tried to follow the movements and developments of human nature. The van of investigators was gallantly led by John Ferguson MacLennan, whose work still remains a classic, though some of his conclusions have been modified, and new facts adduced by later writers from Charles Darwin to Lord Avebury, but MacLennan's brilliant essay on "Primitive Marriage" stands out as the pioneer.

In the western hemisphere the ideal of what is termed "Christian marriage" seems to be practically universal in modern times. How far the epithet "Christian" is justified we may have occasion to inquire later, merely noting here the tendency that has persisted from the most primitive states of society, to invoke the religious sanction in support of tribal and national customs. But when we look for the defining quality of "Christian marriage" the only universal characteristic seems to be monogamy. Large sections of the Christian church add indissolubility, but the civil codes of most states say "dissoluble on terms," which terms tend constantly to grow easier, notwithstanding strenuous opposition by the church. Some time ago a disputed succession to an English peerage depended on the validity of a marriage with a Zulu lady, and the Zulu formalities, including sacrifices, gifts of cattle, and various ceremonials,

were minutely discussed, but the one crucial question was whether Zulu law and custom permitted the bridegroom to take another wife in the lifetime of the one he married.

Like fossils in the rocks, preserving the memory and the very appearance of long extinct forms of life, so the memory of primitive marriages in many cases remains to this day, inshrined it may be in symbolic rites, whose very meaning is almost forgotten, till we go back to the primitive customs in which they originated. And to find a way through the diversities of the marriage laws today we may need to go back in fancy to the primitive forms, as the historians and philosophers have traced them for us. And probably the result will be to emphasize the futility of attempting to assimilate those laws by any legislation.

The study of the history of primitive marriage is amazingly complex, and since MacLennan published the "Studies in Ancient History" in 1876 the literature has grown to an enormous extent, and many rival theories have shown the great fluctuations of opinion as fresh evidence has become available. But one point seems to be generally conceded, that in the most primitive state of social customs and regulations some tribes were what MacLennan calls endogamous, that is, permitting marriage only with members of the tribe, others were exogamous, forbidding such marriages. How or why they became so, whether by the gradual development of custom, or by divine revelation, or by the imposition of a law, and if so what was the reason and origin of the law, are still the subject of doubts and disputes, and of many varying theories, involving the history of totemism and tribal customs, and need not concern us. Some there are who, with much show of reason, assume that the differences of endogamy and exogamy are inherent in human nature, and may even be traced in the vegetable kingdom, and that therefore they are permanent as human nature itself. Our concern is merely how far they may be taken to affect our laws and custom today.

It is generally assumed that the primal form of marriage was by capture, and this would be the natural form with an exogamic tribe. And there is a mass of evidence to show that, even long after the more civilized forms of marriage by purchase or by agreement had taken the place of capture by force, the form was still kept up in a sort of pantomimic ceremonial. And some there are who maintain that even among ourselves the bridal veil is not the symbol of virgin purity, but the relic of the blankets in which the captured bride was rolled up and carried off on horseback by force from her

kin and tribe, and that the throwing of an old shoe is the remains of the fight to resist her capture.

Probably the marriage laws and customs of the west since the Christian era may be said to be derived from Jewish custom and tradition, interpreted by Roman law, and developed through the centuries by the two authorities of the state and the church, sometimes acting together and often in rivalry. Here, then, we may see the origin of many of the strange diversities. For the two authorities follow diverse ideals. The state is and must be opportunist, holding for an ideal what is best for the community at large. The church on the contrary must hold the ideal of divine revelation and rules and a system permanently established. To this there can be no exception and no reservation. Moreover, the subject matter on which these two authorities act itself comes from two sources widely divergent, the Jewish and the Roman, and behind all are the ineradicable forces of human nature.

The church has asserted that Christ restored monogamy by definite decree, and the statement has been so constantly and positively repeated that it has passed without challenge. But the word "restored" is not borne out by the Jewish scriptures. Theologians found on the text in Genesis: "In the beginning God made them male and female, and said, for this cause shall a man leave his father and mother and be joined unto his wife, and they twain shall be one flesh," quoted by Christ with approval. This quotation, however, was not made with regard to any question of polygamy and monogamy, but of the right of a man to put away his wife, a very different matter. Moreover the Jewish interpreters of the law, especially the cabalists, certainly did not usually take the words in this sense. There seems to be no doubt that from the earliest times the Jews were polygamous, nor is the practice condemned anywhere in their law. It is perhaps noticeable that Christ's most accepted title was "Son of David." But the genealogy shows that the descent was traced through Bathsheba, though David's legitimate wife was Mical, the daughter of Saul, and no comment is made on that fact, as we might expect if it were regarded as an illegitimate descent. The fact seems to be that by custom the Jews were polygamous for all their early history, but after the return from the Babylonian captivity the custom changed, and they became and were in the time of Christ strictly monogamous. There was, therefore, no need to restore monogamy, which was already customary and practically universal, nor any call for a decree on the subject.

But through all history we find the same tendency to invoke the

sanction of religion in support of accepted custom. Even the most backward tribes of the Australian natives who have neither metals, agriculture, pottery, nor domesticated animals, yet have well defined exogamous customs, attributed in their myths to certain wise ancestors, inspired by the supernatural tribal All Father, who speaks through the medicine man. Hence, as Andrew Lang says, they now think certain unions wrong because they are forbidden; they were not forbidden because they were wrong. We follow the customs through many different primitive races, in various states of development, all over the world—some seemingly the most backward now living on the globe; some, like the Zuñi Indians, apparently degenerate remnants of very old, and now extinct, civilizations; and everywhere we find the same principle; some tribes are endogamic, some are exogamic, some present a mixture of the two systems, but in every case the religious sanction is invoked. That mysterious entity the totem (perhaps the tribal god) would be offended, and must be placated. The totems of neighboring tribes must be considered also, and the taboos must be observed.

The Jews appear to have been endogamic with regard to race; the prohibitions against intermarrying with surrounding nations or worshiping their gods were very rigid. But with regard to the family they had a modified exogamy, the near relatives with whom they might marry being very carefully laid down in Leviticus. There was no prohibition against a man taking several wives—in early times he usually did—but it seems that on marriage the wife passed "in manum" of her husband, who thenceforth became responsible for her and might not put her away, for that would be to cast her on the world without a protector, though a certain relaxation of this rule was permitted by Moses. This then was one of the test questions put to Christ, who without hesitation affirmed the ancient law.

But with the Babylonian captivity the custom changed entirely, but not the law. Whether Ezra the Scribe simply re-edited the old books of the law, writing them in the Chaldee characters, and correcting mistakes that had crept in, or whether, according to some traditions, he was divinely inspired with the knowledge of the Scriptures which had been lost in the captivity, the fact is always strongly insisted on that his recension was the original law. Yet the returned Jews were and remained strictly monogamous, retaining, however, all the old prohibition against foreign wives. And this custom of monogamy has remained to this day over the entire western world, with the one exception of the Mormons. It is pecu-

liar, however, that though this one characteristic is universally accepted as being that of Christian marriage, there is nowhere a prohibition of polygamy by the Christian church; the custom seems to have been universally taken for granted.

It must not, however, be supposed that the religious sanction was omitted or overlooked. At a very early period of the Christian era, the church acquired jurisdiction over all questions of marriage among its own members. How or when this jurisdiction was assumed it is impossible to say exactly. Probably the first Christians were married according to the forms of Roman law, with a benediction from priests of their own faith, the latter we may suppose in the days of persecution given secretly. But the recognition of marriage as a sacrament would naturally give the priests of the Church much jurisdiction concerning it, and when the whole empire became Christian after Constantine, this jurisdiction was relegated to the church courts, and these courts, like the civil courts, were constituted with minute accuracy on Roman forms; the Corpus Juris Canonici being as strict and definitely logical as the Corpus Juris Civilis. Thus, as before remarked, it came about that the marriage laws of the western hemisphere arose out of the ancient Jewish law and custom, as interpreted by Roman jurisprudence, and administered by the church, subject to a continually growing, but always bitterly-resented, interference by the civil laws of various states.

The details of this growth and development, and the divergences arising therefrom have been told in many ponderous tomes, but the origins have been but little traced. Yet if we take the great works of MacLennan, of Charles Darwin, Westermarck, Atkinson, Andrew Lang, and perhaps greatest of all, Charles Hill-Tout, and apply the principles there brought out to the complications of modern marriage law, a great flood of light penetrates into the obscurity. And much that we have been accustomed to regard as fixed and unalterable rules of right and wrong appears merely as inveterate custom, and custom itself only as a material expression of human nature. Durkheim says: "His hereditary totem is the last thing a primitive man changes." We may go a step farther and say his hereditary custom is the last thing that any man changes, even long after the reason for it has passed away and been forgotten.

In the Middle Ages came the time when the church urgently needed money, and began to grow somewhat unscrupulous as to the means of raising it. The marriage jurisdiction was a fertile source of revenue. We know the scandal of the sale of indulgences, and

the thesis that Luther nailed to the church door, the final spark that lighted the smoldering fires of the Reformation. Dispensations relaxing the strictness of the marriage laws were also an exceedingly fertile source of revenue. It is obvious that the stricter these laws were made, and the greater their complexities, the more would human nature crave, and be willing to pay for, a dispensation to break them. The Table of Affinities was a prolific source of requests for dispensation. Some of the more distant relationships might be dispensed with benefit to the parties, and profit to the church; the temptation to extend the list must have been very great. Again, since a man and his wife were one flesh by Christ's own words, it followed that her relations were also his, and intermarriage was forbidden. But since there was no logical or practical argument against such marriages, they might well form the subject of dispensation. Again, the characteristic of indissolubility before alluded to must at all costs be preserved, but if a man had married a woman within the prohibited degrees, and had not procured a dispensation, the marriage of course was null and void. He could not put away his wife, it is true, but if the church pronounced that she never had been his wife, the same result was attained; and the wider the net of the prohibited degrees, the easier to find a reason for nullity. A great extension of these degrees was affected by the theory of spiritual affinities. Sponsors were in the same position as natural parents, and had the same affinities and the same prohibitions. Thus a godfather might not marry her for whom he had been sponsor. The Council of Trullo goes farther, and ordains that he shall not marry her mother. The catechist may not marry the catechumen, nor the baptizer marry the baptized, nor might a man and woman who had been sponsors for an infant marry each other. It is obvious that it became almost impossible to tell whether in any given case the prohibited degrees were infringed or not, and nullity was easier to obtain than divorce is now.

In this connection it may be useful to remember the fifty years of agitation before the marriage with a deceased wife's sister was legalized in England. A strong section of the Anglican church took a very firm stand, asserting definitely the principle of affinity, but denying the Roman power of dispensation. The arguments pro and con are exceedingly instructive, especially when read with a knowledge of the primitive customs of endogamy and exogamy, of the Jewish laws, and the table in Leviticus, and the history of the prohibition of such marriages in the medieval church, all of which is accessible in the literature of the time.

The marriage laws of ancient Rome also left traces, still discernible, and some there are in our own times who think the modern world might do worse than recur to that system. Stating it very broadly we find in ancient Rome the patrician form of marriage by "confarreatio." This was sacramental and indissoluble. The parties partook of the consecrated cake of barley meal in the presence of ten witnesses before the Pontifex Maximus. The plebeian forms, thought beneath the notice of the earlier writers, and first mentioned by Gaius, were "coemptio," the conventionalized form of marriage by purchase, and "usus," which was almost the Scottish "habit and repute." These marriages seem to have been practically hardly distinguishable from civil contracts, which could be dissolved at any time by appropriate words and ceremonies. For these forms there was no religious sanction; their analogue may be found today in the civil marriage, common in continental countries, and the English and Scottish register-marriage. But here again human nature came in, the tedious formalities, and above all the indissolubility were irksome, and even the patricians, except for the most solemn occasions, came more and more to be married by coemptio or usus. Sometimes a marriage by usus might receive the solemn religious sanction of confarreatio years afterwards. But by degrees this form became obsolete, and Cicero mentions only usus and coemptio.

Looking now at modern times we see the various influences we have traced into the dim past, still in active operation. On the one hand we see the so-called Christian marriage, in its strictest form, monogamous and indissoluble, supported by the church, and to a large extent by convention; and on the other a distinct popular desire for some relaxation of the strictness, especially in the matter of indissolubility, and arguing with some show of reason that the church can show only custom as the sanction for the strict forms. Slowly, and with much caution, despite the strenuous opposition of the church, the civil law in many countries has followed the popular desire. Divorce is now permissible in most countries, but on very varying grounds. Probably on the whole the French system is the most complete and logical.[2] The whole tendency of legislation in modern times has been to simplify divorce, and also, as in the case of the deceased wife's sister, to modify the Table of Affinities. Another attempt to modify the unbreakable permanence

2. See *Comte de Franqueville*, "Le Système Judiciaire de Grande Bretagne," a work of singular completeness and accuracy, wherein the results of the two systems are compared.

of the tie deserves a passing mention, in the old Celtic custom of handfasting, which permitted a union for a year and a day, to be then dissolved or made permanent according to definite rules, best known of all the tribal and clan customs, through the "Fair Maid of Perth."

Thus we may see that as in ancient Rome, as also in the primitive peoples all over the world, the gradual tendency has been more and more to relax the strictness of the religious sanction, which the church has as strongly struggled to maintain, and hence a most undesirable conflict as to the remarriage of divorced persons, recognized by the state, but deemed a ground for excommunication by the church, and this has led many to advocate a return to the system of ancient Rome, of a civil marriage, made by and dissoluble by the state in such manner and for such causes as may be laid down by the legislature, and a religious marriage for those who prefer it, indissoluble on any grounds whatsoever.

When we come to consider the question of how marriage is constituted we are confronted again with bewildering varieties. Even within the island of Great Britain the form which is valid in Scotland is invalid over the border, a fact which has given rise to many complications and formed the basis of many romances. Most people know of the elopements from England to Gretna Green, the first place over the border on the old coaching road, in order to take advantage of the Scottish law, but not many know of the earlier elopements from Scotland to England, to avoid the publication of banns.

Yet there is one clear principle underlying all the differences, applicable to every country and every period in the Christian era, that it is consent that makes marriage. It is not coitus, it is not a civil or religious ceremony, it is not the presence of a priest, or any minister of religion. Purely and simply it is consent, mutually exchanged with the definite intention of becoming man and wife. Not even the presence of a witness is necessary to constitute a marriage. The difficulties come in where the marriage has to be proved, and here every court, every system of jurisprudence, every church, or other religious body, has the right to lay down what will be accepted as proof. Or as Lord Fraser puts it, the consent must be expressed in the form and manner that the law requires. But though the presence of a priest or minister of religion be not necessary to constitute a marriage, it may be asked whether the church required such when it came to proving the marriage. Before the Council of Trent there seems to be no doubt that the dictum of

Reichel is the correct one, viz., "That no other minister is required distinct from the parties themselves; for they themselves minister the sacrament to themselves, either the one to the other, or each to themselves."[3]

From the thirteenth to the sixteenth century the Papal administration of the marriage law was notoriously extremely lax, and scandals arose in connection with sale of dispensations and other matters which roused the conscience of civilized Europe, and reforms were urgently demanded. The Church of Rome itself led the way, and the Council of Trent enacted that the presence of an ordained priest and the religious ceremonial is necessary to the validity of a marriage. That is to say, the Roman church will not recognize a marriage unless it is vouched by these essentials to proof; and such has ever since been the rule of the Roman communion. Every state prescribes its own rules as to the essential manner of declaring the consent that made the marriage. England and Scotland are typical examples of variations. It must be observed, however, that among all the diversities every country and every religious body practically agree that it is the consent that makes the marriage, and the Roman communion is perhaps the most logical and consistent of all in saying definitely, "the consent must be declared before a priest of our own church; we will admit no other evidence." Obviously here there can be no doubt. "The consent may have been exchanged elsewhere in other circumstances, but we have no evidence that we can accept that it has been so. You ask us to admit the marriage. We don't deny it, but we can't accept it without the essential evidence."

In Scotland the influence of the Puritans made the rules exceedingly elaborate and drastic. Space does not permit of enumerating them here; the curious student will find them fully set out by Lord Fraser.[4] Suffice it to say here that it needed very cautious steering to avoid the ecclesiastical ban, which not only rendered the marriage invalid, but subjected the parties and the luckless minister who performed the ceremony to heavy penalties. The object no doubt was to prevent immorality, but the effect was the contrary.

Things, however, were easier in England. Neither banns nor licenses were needed, and there was no restriction of place or time, only the presence of a clergyman, and not necessarily of the Church of England. Amorous couples fled over the border into England to escape the tiresome formalities of the Scottish law, and accommo-

3. See "Manual of Canon Law," p. 340, n. 61.
4. "Husband and Wife."

dating clergymen were always to be found just over the border, willing to tie the matrimonial knot for any who would pay the fees. These marriages were termed clandestine or inorderly in Scotland, and the whole might and majesty of the consistorial law of Scotland was arrayed against such. Puritan authorities of Scotland were greatly offended by these English elopements, evading their own sterner discipline. So in 1641 there was an act of the Scottish Parliament re-enacted in 1661 which "prohibits and discharges all men and women having their ordinary residence within this kingdom to get marriage to themselves with others within the Kingdom of England or Ireland, without publications of banns here in Scotland."

So it appears that each country prescribed formulas for expressing their consent in the absence of which the marriage was to be deemed clandestine and inorderly, and even though it were celebrated by a minister of religion, it was still clandestine unless the other formulas were observed; the marriage was valid, but involved various pains and penalties. On the one hand was drastic and severe legislation to prevent clandestine marriages; on the other a determination to evade such legislation. In England the presence of a minister of religion was necessary to the validity of the marriage, and a heavy fine was imposed on him if the other formalities were not complied with, the intention being to cast on him the responsibility of seeing that all was done orderly. But there was still a loophole, through which, when one or two had crept, many followed. In the notorious prison of the Fleet were many debtors confined. These, so long as they did not quit the boundaries of the prison, had considerable liberty; in fact they could earn money in any way they chose, and needless to say it was a place of amazing disreputability. Readers of "Little Dorrit" and many other articles and stories of the time will remember vivid pictures of this sink of eighteenth century rascaldom. Hither, then, sundry parsons found their way, whose orders were as indubitable as their general blackguardism. Marriages by them were perfectly valid by English law, but no fine for celebrating them had any terrors for a man who had nothing, and who was already suffering the supremest penalty for debt that the law could inflict.

The records of these marriages are extremely interesting. An account of them may be found in the Weekly Journal for 29th June, 1723. Within the precincts of the Fleet were many taverns, and it seems the tavern-keepers used to keep clergymen in their

houses as an attraction at 20s a week, but it was reported that one clergyman, who would stoop to no such conditions, made at least £500 a year in fees for his services. A full description may be found in Burns' "History of Fleet Marriages," which practically exhausts the subject, and therein we may see many of the advertisements of these matrimonial hucksters. A guinea seems to have been the ordinary fee, and this was shared between the innkeeper and the parson, with a shilling to the tout who brought the couple to be married. Burns enumerates eighty-nine Fleet parsons by name, including the notorious, or infamous, John Gayman or Gainham, popularly called "Bishop of Hell," described as "a lusty jollie man, vain of his learning." The Grub Street Journal in 1735 speaks of the touts of the Fleet marriage hucksters—"These ministers of wickedness ply about Ludgate Hill, pulling and forcing people into some peddling alehouse, or brandy shop, to be married, even on a Sunday, stopping them as they go to church, and almost tearing the clothes off their backs." Pennant's "Account of London," in 1733, also gives an interesting and somewhat lurid account of the Fleet and its marriages.

In 1821 the English government purchased the registers of several of these marriage houses, and deposited them with the registrar of the Consistory Court of London, and in these, which can be consulted by the curious, there is complete evidence of the iniquities of the Fleet parsons. It was commonly believed that if a woman, married at the Fleet, should thereafter run across the road in her shift, neither she nor her husband would thenceforth be responsible for her debts. Ladies troubled with duns and debts had recourse to the Fleet. Fortune-hunters employed touts to abduct heiresses, and ladies who needed husbands for reputation's sake sought the accommodating Fleet parsons. Well-known and noble names occur in these musty old registers. There the impetuous young Duke of Hamilton wedded the beautiful Elizabeth Gunning with a curtain ring, and Henry Fox, afterwards Lord Holland, being refused the hand of Lady Caroline Lennox, stole her and married her at the Fleet. As Walpole naïvely remarks, "His father was a footman, her grandfather was a king, and hence the trouble." All the same, history knows her as Lord Holland's wife, and her royal descent is well-nigh or quite forgotten.

There is humor, too, in some of these old records. One happy couple stole the parson's clothes-brush, as he quaintly bewails himself, another who would only pay half the fee are recorded as

being half-married, whatever that may mean; and where an intending bridegroom encountering some scruples even from a Fleet parson threatened him with a sound thrashing if he did not tie the knot forthwith, the parson took his revenge by adding "N. B. A material part was omitted." But the scandal of Fleet marriages grew too notorious to be tolerated, and in 1753 Lord Hardwicke brought a bill into Parliament making the solemnization of matrimony in any building but a church or chapel, and without banns or license, a felony, punishable by transportation, and declaring all such marriages null and void. One notices that the opposition to this bill was led by Henry Fox, and we may conclude that he found his experience of the Fleet entirely satisfactory. So the Fleet marriages came to an end, and with them the matrimonial business of the rival chapels of the Mint and Mayfair, but the old prison itself was not abolished till 1844, after the inquiries into its iniquities had lasted over a hundred years.

But the stricter the marriage laws, the more eager and ingenious will people be to evade them. As England grew stricter, Scotland became easier, and when Lord Hardwicke's Act became law Gretna Green took the place of the Fleet, and couples eloped from England to Scotland. But the dingy disreputability of the latter was gone never to return. The Puritan severity of the Scottish laws was relaxed, and it came to be understood that a clandestine or inorderly marriage was perfectly valid, though still frowned on by the Presbyterian divines, and that the simple interchange of consent, if made on Scottish soil, was sufficient; and if proved by the testimony of witnesses was recognized by the courts. Gretna Green was the first place over the border on the North Road, after passing Carlisle, and to Gretna therefore did eloping couples betake themselves, to take advantage of the Scots law. But the English mind still desired some kind of ceremony, though utterly unnecessary in Scotland, and so the famous blacksmith, wise in his generation devised an impromptu ritual, and kept a register, and drove a roaring trade; but he was not alone, though he was the first; there were others at Gretna who kept marriage shops, and there were other villages near the border where the same business was successfully carried on. But this easy evasion was not to pass without English opposition, and Gretna Green elopements were practically ended about a century after Lord Hardwicke's Act, by another brought in and passed by Lord Brougham,[5] which enacts that in the case of persons not having their usual place of residence

5. 19 and 20 Victoria, c. 96.

in Scotland, one or the other of the parties must have been in Scotland for a period of at least twenty-one days. The very last Gretna Green marriage was that of an English barrister, who delighted in detailing his experience to a select circle of friends.

The necessary formulas for expressing the consent that makes the marriage are now fairly well ascertained, both in England and Scotland. In England there is no clandestine or inorderly marriage recognized. To constitute a regular marriage there must be either banns or license, the place must be a church, or a licensed chapel, or a registrar's office. In the case of a registrar's office there can be no religious service. The hour must be between 8 A.M. and 3 P.M. (called the canonical hours) and one of the parties must have been for fifteen days resident within the parish where the marriage takes place. But the old dispensing power of the church still lingers, never given up, and by a special license obtainable for a substantial fee from the archbishop (whose functions are now exercised by the Court of Arches) the parties may now be married without banns or ordinary license, and at any place and any time.

In Scotland the regular marriage may be celebrated at any time, there are no canonical hours, and may be in any place, a private house, or even in the public street; but it must be by the minister of some denomination (and for this purpose a Jewish Rabbi, or the official to whom in the Society of Quakers that duty is assigned is counted as a minister) and in the presence of two witnesses, after due proclamation of banns, or publication of notice by a registrar. The minister must see that the certificate of banns or notice is duly produced, and the marriage must be registered. These requirements are enforced by penalties.

Clandestine, or irregular, or inorderly marriages are constituted in three ways:

(1) By declaration or consent de presenti, which must be made with the full intention of marriage, and not in joke, or for the mere sake of respectable appearance in a temporary connection. It need not be before witnesses, except for the purpose of proof. In the case of Sir Hector Macdonald, in 1894, Lord Stormonth Darling accepted the evidence of the wife alone, as sufficient corroboration, there having apparently been no witnesses.

(2) By promise, subsequente copula, wherein the exchange of consent is inferred from the actings of the parties, though no definite proof can be brought.

(3) By habit and repute; that is to say, by the parties living

together, and holding themselves out as married persons, and being commonly known as such, though no specific promise or acknowledgment can be proved. This depends on an old Scots Act (1503, c. 77), which was passed in conformity with the older Canon law, under the decretals of Gregory IX,[6] and is commented upon by Esme,[7] and in England by Lord Westbury in the *Breadalbane* case.[8]

Some have thought that an irregular marriage constituted by promise subsequente copula was the same as "handfasting," but the decretal of Gregory[9] clearly proves that this was never the case in Canon law.[10] The Consistorial law of Scotland here followed the Canon, as was shown in the case of *Kennedy* v. *M'Dowall,* where a man having seduced a young lady of high rank and fortune, promised to marry her if a child was born. It was said that though a child was born no marriage was constituted, as the condition invalidated the promise,[11] and notice that in the custom of "handfasting" the fact of the birth of the child would either in itself have constituted the marriage, or have at all events laid an obligation on the man to constitute it by legal rites. Nevertheless there is some evidence, though not decisive, that the custom of "handfasting" was recognized by consistorial law, and in any case, even as a clan or tribal custom, the conditions seem to have been rigorously enforced. The whole of this custom deserves fuller and more careful examination than it has yet received.

It is generally said to be of supreme importance that marriage should be certain, that no doubt should be possible whether it had been constituted or not, and that the marriage laws of all countries are directed to this end. A few illustrations will show how far this end has been reached in Great Britain.

If a man being a Roman Catholic, and having a dispensation, married his deceased wife's sister in a Roman church his marriage was recognized by the Catholic church; but until a very few years ago it was not recognized by the state, either in England or Scotland, nor by the church of either country. It is now recognized by the state, but apparently not by the Anglican church, save so far as it is compelled by the state. If a marriage is constituted

6. 2, 23, c. 11.
7. "Le Mariage en Droit Canonique," I, p. 189.
8. L. R., 1 H. L. Sc. 182. See also the articles by Professor Maitland in the English Historical Review for 1906.
9. IX, 4, 5, 7.
10. See *Boehme's* commentary on this decretal "Jus ex Protestan," 4, 5, 7.
11. See Ferguson's Reports, p. 163.

by any of the three irregular methods subject to the provisions of Lord Brougham's Act, on Scottish soil, it is recognized both by church and state, both in England and Scotland; but if it is constituted with precisely the same formula, it may be only half a mile off, over the border, it is not recognized anywhere, and this seems to be the case though the parties were in fact ignorant of where the border line runs. If two parties are married in England at a chapel licensed for marriages, the marriage is recognized everywhere, by both church and state, but if they are married at a chapel hard by, not so licensed, though they may be ignorant of the fact, the marriage is not recognized. And none of these marriages are recognized by the Roman Catholic Church.

Again, if two parties are married under the state laws at a registrar's office, such marriage is recognized both by state and church, but if under the provisions of the state laws they are divorced, and either of them as permitted by those laws should remarry, the state recognizes such remarriage, but the Church of England apparently does not. No priest of that church is bound to perform the ceremony of marriage in such a case, or to permit it to be performed in his church, and the parties, in many cases, though obeying the law of the land, may find themselves excommunicated by the state church. In Scotland apparently a marriage recognized by the state is also recognized by the established church. I say "apparently," for in neither case is there any direct ruling binding on the whole church, but in England at all events a large and powerful party are very strenuous in their assertions of what they believe to be the law of the church, and very determined in their resolve to enforce such law, and if possible to impose it on the state. The question of the recognition in England of American marriages and divorces is extremely interesting, but would take an article to itself to indicate even the broad outlines.

Here then we see the old questions of indissolubility again cropping up as vigorously as at any time throughout the centuries—the church determining to enforce this principle by any and every means; human nature, on the other hand, with a certain slow and half-hearted countenance from the state, refusing to recognize this as an essential principle. Also in the Table of Affinities, and the resulting principles of recognition, we find again the old customs of endogamy and exogamy, and the opposition of church and state, as exemplified by the fifty years' conflict over the question of the deceased wife's sister, terminated at last in the victory of the state,

representing the will of the people, and the persistent conflict still going on over the question of divorce, in which every step is fought by the church with the most bitter determination.

Two other examples of consistorial law shall conclude. In Scotland if a woman is divorced for adultery, the one person in the world she may not marry is her paramour. In England the state allows her to marry whom she will, outside of the Table of Affinities. If a man shall marry his mistress, by whom he has had children, in Scotland those children become legitimate, in England they do not; England in this respect standing alone among civilized nations.

Out of all this welter, the examples of which might have been multiplied far beyond the limits of space, is it possible that any consistent or logical system will ever emerge? It seems unlikely, if the differences are, as we conceive, ingrained in the very nature of humanity. The Roman church is at least logical, saying we have the right to make rules for our own people, and we have made them; they refer to no one else. The Scottish system follows practically the old Canon law before the Council of Trent modified it for the Roman Catholics, and the Scottish Church generally follows the state. The English system seems to be an eternal conflict between church and state, of which the best one can say is that a state of transition is rarely logical.

Is it possible that we shall ever get a real answer to the question: Is there any such thing as a system or theory of marriage that can be definitely called Christian, that is to say, formulated and ordained by Christ, as distinguished from church tradition, and decrees of councils, and which does not simply proceed from that tendency deep-rooted in human nature, and seemingly old as the world, to seek for a religious sanction to justify inveterate custom? Did Christ really make any ordinance changing or modifying the ancient Jewish law? Can any words of his be construed to bear such a meaning, without forcing an interpretation beyond the literal and obvious meaning? And if so, is it the old Canon law, or the modern variations adopted by the several branches of the Christian church? And, finally, if the latter, which branch most truly represents the decrees of the founder? Theologians should fairly face these questions, and agree on a distinct and definite answer, if they are to give a lead to the legislatures of various countries calling themselves Christian, and justify the church's claim to be the administrator of the marriage laws of all Christian communities.

THE STUDY OF INDONESIAN CUSTOMARY LAW

By C. Van Vollenhoven[1]

The term "customary law" is not exactly correct, because the uncodified law of the Indonesians—their "Adat" law—embraces, besides laws of custom, some native regulations and a few contributions from Hindu, Muhammadan, and perhaps Christian law. But customary law forms by far the greater part of the Adat law; and it may, therefore, justly be called by that name.

The study of this customary law of Indonesia—under this name we include, besides the Dutch Indies, in particular the Philippines—has for years had to contend with two fatal misconceptions. The first of these assumed that this kind of popular law could be studied in written documents, learned native records, edicts of native princes, works upon religious law. The second misconception, not less dangerous, assumed that it could be systematized similarly to modern law of Western Europe and the United States, or at least in the same way as the Corpus Juris of Justinian.

The government of the Dutch Indies has not to any extent been guilty of the first error which regards local research as superfluous and which is, therefore, highly seductive to the indolent. Nor have Dutch civil servants, philologists, or missionaries erred in this distinction. It is true that from time to time influential jurists, accustomed to acquiring their European law from books, have been tempted to seek for the popular law in "undang-undang," "sarakatas," Muhammadan "kitabs," etc.; but the crushing refutation of this mode of procedure by Dr. Snouck Hurgronje in his book upon The Achehnese has, for the Dutch part of Indonesia at all events, driven this error from the field. The Bureau of Insular Affairs at Washington seems for a moment to have fallen into the same error when, in 1913, it presented to the Dutch legation as a work on the Adat law of the Philippines a book by Najeeb M. Saleeby, "Studies in Moro History, Law, and Religion" (1905),

1. [The author was born in 1874, at Dordrecht (Holland); made studies in oriental law and languages at the University of Leyden, 1891-1895; was connected with the Colonial Office at The Hague, 1895-1901; and has been professor of Colonial Law at the University of Leyden since 1901. He has written a treatise on Indonesian Customary Law ("Het Adatrecht van Nederlandsch-Indië," Vol. I, 1918), and on international law.—Ed.]

which book in no sense gives the true Mindanaotic Adat law, but some native records (luwaran) of Adat laws in Mindanao and Sulu, framed in rules from Muhammadan law books, and as misleading as are the undang-undang of the Dutch Indies. The method against which we here contend has been brought to the point of positive caricature by the Berlin professor, Josef Kohler, in his book on "Das Recht der orientalischen Völker,"[2] in which, taking a few native documents from Java, Sumatra, the Malay Peninsula, and South Celebes, he reproduces "the law of the Malays" in a sketch from which no native would recognize his own Adat law.

At the same time, the second misconception, which would apply modern European conceptions to Indonesian legal institutions, is even more pernicious. Both in the Dutch and the American part of Indonesia the foundation of the whole agrarian law of the inhabitants is the very important, but amongst Westerners entirely unknown, "right of disposal" ("beschikkingsrecht"); that is, a clan or village is authorized, to the exclusion of all others within certain territory, to collect the produce of the forests, break up and cultivate the ground, etc.; natives of other clans or of other villages, on the other hand, may only do this by permission of the first clan and upon payment of a recognition fee. Both in the Dutch part of Indonesia (the Moluccos, Sawu, Soomba) and in the American part (Tirurayes, Ifugao) we find the influential personality of the "chief of the soil" (ground guardian, "grondvoogd"), a descendant of the founder of the village, whose intermediation is essential in all agrarian transactions, and who is not inferior in rank even to the heads of village or clan. Bali (Dutch Indies) and Ilocos Norte (Luzon) possess native "water work corporations" (water work systems organized in corporations, "waterschappen") by which the supply, etc., of water is regulated in a peculiar and highly beneficial manner. The villagers of Indonesia are not distinguished according to their wealth or trade, but by the question as to whether their ancestors originally belonged to the village ("kernel villagers," "kerndorpers") or whether they have settled there later; only the former share completely in the burdens and privileges of the village, and in all the burdens imposed by a native prince. Western distinctions and ideas such as "consideration," the "civilis possessio," the contrast between absolute and relative rights, are quite unknown in Indonesia. In betrothals and transactions concerning property, a promise is not binding unless it is accompanied by a *visible token*.

2. (1914), pp. 53-55.

The law is nowhere individualistic, like Roman law was; but every one is bound to exercise his rights with due consideration for the interests of his surroundings—on which account the servitutes of Roman law are unnecessary and unknown—moreover the sentences of native judges are of a conciliatory, helpful, and familiar character. From all this and more, it is obvious that an attempt to describe the law of Indonesia according to the systems of Europe or the United States involves the writer in constant difficulties and obscurities, and the result is a description that resembles in no single feature the living Adat law of every day, in the house, the rice field, the market-place, the village assemblies.

It is incumbent upon students of Indonesian Adat law to acknowledge with gratitude the data which in the few years since 1899 have been collected for the Philippines by writers such as Barrows, Christie, Cole, Jenks, Reed, Worcester, and others. At the same time it is natural that the Dutch, who have been able to begin sooner and to work in a wider field, have on their side collected much valuable material. The impulse was given by an order for a careful study of native agrarian laws, which in 1867 was given for Java, the results of which were published in three ponderous volumes between 1876 and 1896, and which was followed after 1870 by similar researches on a smaller scale in Sumatra, Borneo, Celebes, the Moluccos and Bali. Civil service officers, philologists, and missionaries have during the last fifty years brought a mass of material to light; the Leyden professor of ethnology, Wilken (died 1891), during his short life gave an admirable description of the marriage laws in their mutual connection, laws of inheritance and criminal law; the present professor of Arabic in Leyden, Snouck Hurgronje, has given a consecutive account of the local Adat law for two districts of North Sumatra (Acheh and Gajoland). Snouck's example has, during the last twenty years, induced the students of Adat law to choose as the centre for their investigations, not Indonesia as a whole, but to divide the Dutch part of Indonesia into nineteen Adat law circles, which are taken one at a time as the centre of careful observation to be later on compared together and the results to be combined. It seems to be established that the Philippines also must have four or more of these law circles, e.g., Palawan, Mindanao, the Visayas, some circles on Luzon.

Seeing that the interests of America and Holland are so nearly allied in this matter, a closer co-operation is highly desirable; the comparative study of law will in all probability be better served by

such data than by generalities which throw into one melting-pot the laws of every century and of all districts of the world. I may, perhaps, be permitted to explain how a co-operation of this kind has been prepared in Holland.

The goal is being approached from three directions.

In the first place, in 1909, the Royal Institute for Philology and Ethnology of the Dutch Indies at The Hague instituted an Adat Law Commission ("commissie voor het adatrecht"), consisting of nine persons, under the presidency of Prof. Snouck Hurgronje, the present Chief Justice of the Supreme Court of the Dutch Indies (Dr. Carpentier Alting) having been one of its most enthusiastic members. The principal object of this commission, which is strongly supported in Batavia by an Assistant Adat Law Commission ("Commissie van bystand voor het adatrecht"), was to sort out and arrange the data that had already been collected, but were buried in official notes, records, etc., and by printing to make them available. The number and variety of the data with which these commissions have thus been able to enrich our knowledge of the Adat law was a surprise. During the eight years of their existence fifteen thick volumes of Adat law ("Adatrechtbundels") have already seen the light. In a sixteenth volume, which is now going to press, there will be found, besides other material, a collection of all that has been brought to light concerning Adat law in the Philippines from old Spanish investigations, more recent English, Austrian, Italian, French, and recent American data. The Division of Ethnology of the Bureau of Science (Department of the Interior) at Manila might, perhaps, work in the same direction, as well as Wilkinson does in the Straits Settlements, the Banjokenkyukwai on Formosa, the Société d'Études Malgaches upon Madagascar, which is distinctly allied to Indonesia; but special Adat Law Commissions for the Philippines and for these other districts would, perhaps, be even more efficient.

In the second place, in 1914, the Colonial Institute in Amsterdam undertook the publication of a series of Adat Law Pandects, three volumes of which have already appeared, while a fourth is in the press. In this publication, which begins with the agrarian Adat law, the available, but heretofore scattered, data are arranged in order, first according to the above mentioned nineteen law circles (the Philippines are also included, although the material for them was scanty), and also according to subject, rights of disposal ("beschikkingsrecht") on soil and water, rights of priority ("voorkeurrecht") on soil, native possessor's rights ("inlandsch bezit-

recht") on soil, rights of gathering produce ("zamelrecht"), mortgage ("pandrecht"), water rights ("waterrecht"), etc. In this way the data of any particular subject in all its details (origin, contents, transitions, lapse of these rights, etc.) can be surveyed at a glance, and at the same time can be seen what data, available for one circle, have yet to be discovered for another.

In the third place, in 1917, in Leyden, an Adat Law Foundation ("Adatrechtstichting") has been created, under the direction of the above mentioned Adat Law Commission (Prof. Snouck Hurgronje, president), the object of which is to place on a permanent basis the study of the Adat law of the whole of Indonesia (not, therefore, only of the Dutch part of it). This foundation has already taken in hand a dictionary of Adat law terms for the whole of Indonesia, which will be all the more useful because the same native nomenclature sometimes has an entirely different meaning in one part of Indonesia than another, and because many of the terms, even with the help of the general dictionaries already existing, cannot be comprehended. Should it be possible in the near future to make a similar foundation in America, in England (for the Straits Settlements and the northern strip of Borneo), in France (for the Tchams in Cambodja and the Howas on Madagascar), and perhaps also in Japan (for Formosa) and in Portugal (for Portuguese Timor), there would then be a way opened for an efficient co-operation on behalf of the comparative study of law between all the countries which have races of the Indonesian or related peoples under their government.

The colonial policy, now almost everywhere adopted, which aims at the moral and intellectual development of the inhabitants, renders this study more imperative than ever. One of the first effects of western civilization upon many natives is that they begin to despise their own language, usages, history, and law as out of date and unimportant. Of course this is only a transitional stage; as soon as they have attained intellectual ripeness they will respect and value the national element in their spiritual inheritance as much as Americans or Europeans or peoples of Chinese origin. It is the duty of western science to ensure that during this intermediate period of transition the national law conception of the eastern peoples does not fall into oblivion or become extinct. Such a task is surely in the spirit of the distinguished expositor of comparative law in whose honor this festival publication is conceived, and whose co-operation would provide a powerful incentive to the interest felt in the United States for the Adat law of Indonesia to manifest itself in deeds.

THE FRENCH ADMINISTRATIVE COURTS AND THE MODERN FRENCH LAW AS TO THE RESPONSIBILITY OF THE STATE FOR THE FAULTS OF ITS OFFICIALS: A COMPARISON WITH THE COMMON LAW

By Frederick P. Walton[1]

Upon what principles may the citizen who has suffered prejudice by the wrongful act of an official recover damages from the state?

Both in France and in England the old doctrine was that the state was irresponsible. But the explanation of this principle has had to be greatly limited in modern times. "L'État c'est moi," "The King can do no wrong," are phrases which do not express the actual state of the law. Bossuet could say correctly, "Tout l'État est en la personne du prince. En lui est la toute puissance, en lui est la volonté de tout le peuple."[2]

This is strongly illustrated by the fact that until the revolution, the state could expropriate property without indemnity. It is true that the practice had grown up of allowing indemnities as matter of grace.[3]

In England, "The King can do no wrong," is a maxim which still lingers in the books, but, in practice, the state by no means

1. [Born, 1858, at Nottingham, England; B. A., Oxford; LL. B., Edinburgh; LL. D., Aberdeen and McGill; Scottish Bar, 1886; Lecturer in Roman Law, University of Glasgow; afterwards Legal Secretary to the Lord Advocate of Scotland; Dean of Faculty of Law, McGill University, Montreal, 1897 to 1914; Barrister and King's Counsel of the Bar of the Province of Quebec; Honorary Member, American Bar Association; now Director of the Sultanieh School of Law, Cairo, Egypt.

Among his principal writings are the following: Handbook of Law of Husband and Wife in Scotland; Scotch Marriages, Regular and Irregular; Historical Introduction to the Roman Law; Scope and Interpretation of Civil Code of Lower Canada; Workmen's Compensation Act of Quebec (1909) with Commentary.—Ed.]

2. "Politique tirée des propos de l'écriture sainte à Mgr., le Dauphin," Liv. VI, art i, §1.

3. See *De Tocqueville*, "L'Ancien régime et la Révolution," pp. 303 and 346; *Teissier, J. G.*, "Responsabilité de la Puissance Publique," p. 9.

enjoys any unlimited immunity, though this is not the place to discuss the limitations.[4]

In France it is now agreed that the immunity of the state exists only when the act in question was an act of a certain kind—a sovereign act—an "acte de Gouvernement" in a restricted sense.

And the tendency is to limit within narrower and narrower bounds the immunity of the state.

There are many reasons for this change of front:

First of all, there is the spread of democratic ideas. Irresponsibility itself has gone out of favor. The downfall of autocracy in Russia is another great step in the general advance. So long as the monarch is looked upon as embodying in his person the powers of the state, it is natural to extend the doctrine of irresponsibility. In the constitutional democracy the inevitable tendency is to restrict this immunity.

I have no desire to enter into the controversies as to the true nature of the state. Some writers, mainly German, would have us believe that the state as such is a sort of Divine Being, over against which the individual citizen of that state has hardly any rights, and the citizens of other states have none at all.[5] We know what such theories lead to, and the consequences do not commend the principle. If some states deny the rights of individuals and claim that they themselves have no duties, they must be convinced of their error by the only arguments which appeal to beings of that type.

Other writers, among whom M. Duguit is one of the most conspicuous, deny that the state has any sovereignty. According to M. Duguit the so-called "laws" which are made by the governing body possess in themselves no intrinsic validity. They are valid only if they conform with an ideal which he calls "la règle du droit." And he leaves us very much in the dark as to the manner in which it is to be determined whether the law does or does not conform with the "rule of law."[6] The persons who, for the moment, hold the reigns of power have, for that reason alone—that is to say in their character of the government—no more right to make laws which

4. See, for a good discussion of the English cases, the article by Mr. *W. Harrison Moore* on "Liability for Acts of Public Servants," in Law Quarterly Review, XXIII, 12.

5. See, for a sober criticism of some of these fantastic theories, *Loening, E.*, in Conrad's "Handwörterbuch der Staatswissenschaften," 3rd ed., s. v. Staat.

6. "L'État," II, p. 1; "Traité de Droit Constitutionnel," I, p. 86.

bind the governed than a band of pirates have a right to issue orders to the crew of the ship which they have captured.

The German school magnifies the rights of the state till its duties are lost sight of. M. Duguit and the French writers of his school magnify the duties of the state and minify its rights until we wonder how under their ideas government is to be carried on.

I do not share either of these extreme views. We must leave the state some sovereignty unless we are to have anarchy. But we may, very reasonably, confine this sovereignty to certain limited fields of action. This is, in effect, what the French and English law have both done, and Voltaire says somewhere that if Englishmen and Frenchmen are agreed upon the solution of a question, the result at which they arrive is pretty sure to be right.

Besides the democratic tendency, there is a second reason why sovereignty has been limited. This is the entrance of the state into the industrial field.

Where the state is, as it is in many countries, the largest employer of labor, it would be highly unjust that it should enjoy immunity from liability for the accidents which will inevitably occur. If the state comes down from its pedestal and takes a place in the work-a-day world, it must be treated like the rest. This is what has happened. The modern state is not content to remain within the sphere in which the old state moved. It does not only pass laws and make war and negotiate treaties, but it enters in a variety of ways into the industrial and economic field. It operates railways, carries on irrigation works, builds harbors, manages hospitals and schools, takes care of public health, of streets and buildings, to mention but a few of its activities. And, in some countries, notably in Egypt, the state discharges all kinds of duties which elsewhere devolve upon municipalities or other local bodies.

It may be tolerable that the state in its sovereign character—"l'État-puissance" should be irresponsible, but it is absolutely intolerable that the state which carries on industries, which is the employer par excellence, should be free to damage people with impunity.

England and France have dealt in different ways with this question of restricting the immunity of the state within reasonable limits.

In England the main points to notice are:

1. The official himself is never excused from his personal liability if his act was wrongful. "The King can do no wrong" is

a two-edged sword. If the king can do no wrong he cannot order an unlawful act to be done, and the servants of the crown must be liable for any act which is not justifiable by a lawful authority.[7] And if the official makes a mistake as to the extent of his powers he enjoys no protection.

2. There is a great decentralization. Public works are carried on by local bodies of various kinds, municipal authorities, harbor-boards, road-trustees, and many others, and these bodies are liable for their wrongs.[8]

3. The Workmen's Compensation Act applies to the crown, except as regards soldiers and sailors.

But, with all these alleviations, there are still cases in which the old rule of state immunity works injustice. It was held in one case[9] that an action would not lie against the postmaster-general in his official capacity for damage caused by the negligence of a subordinate official of the telegraph department of the postoffice in laying an electric cable. This was because there was no relation of master and servant. The postmaster-general and the wrongdoers were both servants of the crown, and the business of the postoffice was of a governmental character and not to be assimilated to an industrial enterprise. The decision was in accordance with the precedents, but it brings out, clearly enough, the unsatisfactory position in which the English law stands.

In some of the British colonies and in many of the states of the American union statutes have been passed which greatly restrict the immunity of the state.[10]

In France the course has been to cut down the "actes de Gouvernement" as to which the state is immune, and to enforce liability for other acts. The principle is, "que la responsabilité de l'État est d'autant plus restreinte que sa fonction est plus élevée—que l'État est exempt de toute responsabilité quand sa fonction confine à la souveraineté."[11]

It is not necessary here to attempt a complete enumeration of what are considered to be acts of sovereignty. It is difficult and,

7. See *Rogers* v. *Rajendro Dutt*, 13 Moore, P. C. 209.

8. See the chapter on Corporations and Local Administrative Bodies in *Beven's* "Negligence," 3rd ed., pp. 281 seq.

9. See, for example, *Bainbridge* v. *Postmaster-General* (1906), I.K.B. 178, 75 L.J.K.B. 366, and the remarks upon it by Mr. *W. Harrison Moore* in Law Quarterly Review, XXIII, 12.

10. See *Goodnow*, "Comparative Administrative Law," II, p. 159, and the article by *J. M. Maguire* on "State Liability for Tort," in Harvard Law Review, XXX, 20.

11. *Laferrière*, "Traité de la Juridiction Administrative," 2nd ed., V. I, p. 680.

perhaps, impossible to find a logical criterion between them and other acts of administration for which there is no immunity. At any rate one of the most authoritative writers on the subject gives up the problem and contents himself with saying that governmental acts are those which have been held by the administrative courts to have that character.[12]

But, broadly speaking, the chief acts which are still considered to be of a sovereign nature are:

1. Acts of legislation, including the subordinate legislation of bodies and official persons with power to make regulations having statutory force;

2. The acts of diplomatic agents;

3. Acts done for the public security in time of war by the competent military authorities, provided there was urgency;

4. Certain other acts of government such as the declaration of martial law—état de siège—and the expulsion of aliens from the territory.[13]

One important legislative change has been made by the French "Workmen's Compensation Act," the "loi du 9 avril 1898," which applies to the state.[14] It would be too ironical if a workman injured in the course of his employment, say, on a state railway, were to be deprived of all remedy because the state was exercising its sovereign power. But, apart from this important statute, the great work of adapting law to modern conditions in such a way as more nearly to satisfy our ideas of justice is a work which has been done by the French courts. It has been done bit by bit, almost imperceptibly, and by special administrative courts. And these courts are in recent years dealing so freely with the rules of the civil law or, to speak more correctly, are rejecting so many of these rules, that it is not at all safe to say where they are going to stop.

We are, as it seems to me, always in danger of forgetting how much of the law grows up in a similar way. A large part of the law comes into existence in a furtive manner. Its authors, far from admitting their parentage, deny it with airs of offended innocence. Judges are never weary of asserting that it is not for them to make law; that this is the function of the legislator. And yet what lawyer does not know that most of the law is the creation of the judges, and that this creative activity of the courts is quite

12. *Hauriou*, "Droit Administratif," 8th ed., p. 79.

13. See *Hauriou*, 1. c. and *Teissier, G.*, "La Responsabilité de la Puissance Publique."

14. See *Baudry-Lacantinerie* et *Wahl*, "Louage," 3rd ed., 2, n. 1847.

necessary for the proper administration of justice? To separate the judge-made law from the rest, and to calculate what proportion it bears to the whole mass would be a difficult task. The calculation, in a rough way, has been made, for the English law, by Mr. Edward Jenks, and he says "as nearly as arithmetical calculation in such a case can go, two-thirds of the fundamental rules of the existing English civil law have been contributed by the labors of English judges."[15] In the calculation he credits the judges, as is quite fair, with the law now embodied in such statutes as the "Sale of Goods Act," and the "Partnership Act," which do little more than codify the decisions of the courts.

Is the proportion of judge-made law much smaller in the French system? I am inclined to doubt if it is. There is, of course, this difference that in France many of the elementary principles are formulated in the codes, and this gives the judges the excuse of saying that they are merely applying to concrete facts the general principles with which they are furnished, or that they are making explicit what is implied in the codes. But we all know that this is not true. Every article in the code which has any vitality in it has, by this time, become incrusted with cases, and if we want to know what the actual working law is, the code will carry us only a little way. Besides this there are important topics—life insurance is one of them—about which the code is silent or worse than silent. I say worse than silent, because though the code never mentions life insurance, it contains certain general articles about "stipulation pour autrui" which are a stumbling-block in the way. In fact, when the French codes were made life assurance was considered as an unlawful act, an immoral speculation.[16] There is a pretty settled law of life assurance in France, but the judges have made it, and the code has been not a help but a hindrance. Take again the subject of responsibility for wrongs. How few and vague are the articles of the code. Where does the law come from which fills the two fat volumes of Sourdat? It comes, almost all of it, from the judges.

I am led to make these remarks because the French law as to the responsibility of the state is one of the largest blocks of judge-made law in France. Most foreign students rather neglect it because it is labeled administrative law and not civil law. It is, however, a very interesting growth. During the last generation, the French civil law has not made many startling advances. The long

15. Harvard Law Review, XXX, p. 14.
16. See "Livre du Centenaire," I, p. 517.

struggle for workmen's compensation gave birth to lively controversy about the nature of fault and about the theory of liability for professional risk or the "risque créé." But most of the practical interest in these questions was removed by the law of 1898 and the laws by which that act was extended in which the theory of liability for risk is adopted. Other changes have taken place, but, for the most part, they are new applications of familiar principles.

But during the same period the administrative law has shown an amazing development. The administrative law of today is a different thing from the law of twenty-five years ago. This, let me repeat, is the work of the courts, and almost wholly of two courts, the Tribunal des Conflits and the Conseil d'État.

Montesquieu's famous theory of the separation of powers has had a history well worth writing. In England and America the vital thing has seemed to be that the administration of justice should be quite separate from the powers of the executive; that the judges should be free from control by the government. In France, as on the continent of Europe generally, what has seemed most important is that the government should not be at the mercy of the ordinary courts. Certain classes of matters in which the government is interested must be withdrawn from the ordinary courts and given to courts largely composed of government officials, and likely on that account to take what may be called an administrative rather than a purely legal view of things. It was some time before it came to be settled in France that when damages were sought against the state in respect of acts done by officials, the action was not competent in the ordinary courts and was not to be decided by applying the ordinary rules of the civil law. And, excellent writers like M. Sourdat still think this is wrong in principle.[17] The principle that the administrative courts were alone competent has been accepted in the French jurisprudence since 1873. The famous *affaire Blanco* in that year may be taken as the turning point.[18]

Once the question of competence had been established in practice, and these cases had been taken away from the ordinary courts, the administrative courts soon threw off the shackles, and said that they were not bound to apply the rules of law stated in the civil code. "La base de la responsabilité de l'État tant vis-à-vis des tiers que de ses agents n'est pas dans un texte positif de droit civil, mais dans un principe supérieur de justice. C'est donc une législation

17. "Responsabilité," 6th ed., nos. 1299 seq.
18. Trib. des Conflits, 8 févr. 1873, *Dalloz*, 73, 3, 22.

d'équité et non de droit écrit."[19] If this view of their powers is correct, and it has been frequently reaffirmed, the French administrative courts enjoy a freedom which perhaps no other courts of justice possess. If the codes do not apply to these questions, there are upon many matters within their competence no other texts to restrain the judges. Nor are administrative courts bound by previous decisions of the civil courts or even by their own previous decisions.

For forty years or more, then, the French administrative courts have been building up a law of their own. If we turn over such a book as, for example, the "Droit Administratif" of M. Hauriou, or M. Georges Teissier's work on "La Responsabilité de la Puissance Publique," we see how modern all this body of law is. Upon this matter of responsibility, in particular, the courts have declined to follow the rules of the civil law and have framed new rules. I propose to examine, in a summary manner, the most important of these new rules as to the responsibility of the state for official acts.

The French administrative courts asseverate their freedom from the civil law rules, and proclaim that the law which they administer is "equity," using that term as equivalent to natural justice. Accordingly, if the results which they have reached do not satisfy the ideas of natural justice, the decisions are self-condemned. The courts cannot say "dura lex sed lex." Now I am not at all sure that these new rules are as equitable as the old ones which used to be applied in France.

Let us compare, briefly, three of the most important of the new rules with those of the civil law. It is understood that we now leave out of consideration all the cases above indicated in which the state enjoys complete immunity because the act in question was a "sovereign act"—an acte de gouvernement—or whatever we like to call it. The discussion is confined to other acts done by officials.

1. Here the traditional theory is that the state is, in the character of a master, or, as the French law calls it, of a "commettant," liable for the faults of its servants or "préposés," so long as these are acting within their functions. The French terms commettant and préposés, it may be said in passing, are more correct than the English terms master and servant.

The superior is liable for many kinds of subordinates who cannot be called "servants" except by an unjustifiable stretch of language. In substance the French and the English laws are in

19. See authorities in *Jèse*, Revue du Droit Public, 1915, p. 23. *Hauriou*, "Droit Administratif," 8th ed., p. 101.

agreement as to the sort of subordination necessary for the existence of the vicarious responsibility of the superior. And, according to the ordinary rule of the civil law and of the common law alike, the liability of the master does not relieve the servant from liability for his own fault as an individual. There is a cumulation of responsibilities. In place of this theory, the French administrative courts have substituted a theory much more subtle. The state is not a master who gives instructions to his servants. It is a moral person which, like all other moral persons, acts by its "organes." The moral person manifests its juridical life entirely in the acts of those who represent it. Take them away and it would be impotent. It would be like an octopus from which we had sheared off the head and the tentacles. When a physical person employs a servant there are two persons and two wills to be considered. But when the organs of a moral person act for it, and act within the range of the operations prescribed by law for the moral person, we may disregard altogether the personality of these organs. The will which they manifest is not their will, it is the will of the moral person.[20] Applying this theory to the state, the practical result is that if damage is done by an official of the state, and he was acting officially when he did it, then the state may be liable, but the official can never be liable. On the other hand, if the official was acting unofficially—if his act was a personal act—he is liable, but the state is not liable. It cannot be, as it is in the civil law, that the servant is liable as an individual and the master liable at the same time for the act done under his authority. "Jamais de cumul," as the French writers say.

2. If we are satisfied that the act which caused the damage was done officially, the further question has to be decided whether, in the particular circumstances, the state is liable. This question must be answered not by inquiring if there was "fault" on the part of the official, using the term "fault" in the sense familiar to us in the civil law. The inquiry must be, was there an administrative fault—a "faute de service"?[21] Here we get another new theory of a very refined nature. The state, which is to a great extent nothing but a group of public services, guarantees a reasonably good administration of these services. It does not guarantee that the administration shall be perfect—far from it—but it guarantees that

20. See *Michoud, L.*, "Théorie de la Responsabilité Morale," II, p. 44 and p. 227; *Hauriou*, "Precis de Droit Administratif," 8th ed., p. 115.

21. *Hauriou*, "Droit Administratif," 8th ed., p. 495; *Teissier*, "Responsabilité de la Puissance Publique," p. 49.

it shall not fall below a certain level. The "administrative fault" consists in an error, a want of judgment, an omission, or an act of negligence, such as the agent would not have been guilty of if he had lived up to this average standard, provided also that the act or omission is official and is not a personal act—a "fait personnel."

3. When the act which caused the damage was a fait personnel the state is not liable but the official is. But what is a personal act? By the civil law rules, commettants are liable when their préposés were "dans les fonctions auxquelles ils les ont employés." And we know with what liberality the French courts have interpreted these words. My chauffeur is in the exercise of his functions if contrary to my express order he takes out my automobile for a joy-ride and runs over somebody.[22] A cab driver in the employment of the owner of the cab steals a purse which a fare has forgotten in the cab. The cab owner is liable.[23] A workman smoking at his work sets fire to the building. His master is liable.[24]

It may be that the French courts extend to a somewhat unreasonable length this liability on the part of the master for acts which he was powerless to prevent. It is at least noteworthy that some modern codes restrict the liability within narrower limits, and in England, where the master's liability is for acts done by the servant "within the scope of his employment," the law is severely criticised in a recent work.[25] But, however this may be, is it desirable that, so long as ordinary employers are treated this way, the state should enjoy a privilege? The answer must be in the negative. But, certainly, in the French law, the state is treated more favorably than other employers as I shall try to show by examples.

The courts and the authors have found it extremely difficult to define a "fait personnel." The favorite formula with the Tribunal des Conflits is that there must be a "circonstance ayant accompagné l'acte administratif mais détachable de cet acte." Probably, if an official in the course of his duties were to set fire to a building by negligently throwing a cigarette into some shavings, this act would be "détachable" from his functions and, would be, therefore, an unofficial act. And, strange though it seems, if the official behaves with malice or recklessness, his act, though connected with his

22. Crim. 23 mars 1907, *Dallos*, (1908) I, 351.
23. Paris, 24 févr. 1909, *Dallos*, (1909) 5, 75.
24. Paris, 15 avril 1847, *Dallos*, 47, 5, 423; *Sirey*, 47, 2, 283; *Sourdat*, "Responsabilité," 5th ed., 2, n. 888.
25. *Baty, T.*, "Vicarious Liability."

duties, becomes a personal act. And it is the same if he makes a gross mistake about his legal powers.[26]

It is commonly said that the gross fault—the "faute lourde"—of an official makes his act a "fait personnel." And, though this is, perhaps, not quite accurate, it approaches the truth. For, according to the view taken by the courts, when the official does an act which is abnormal or monstrous, it may be connected with his official duties and, yet, it may be a fait personnel. "Il y a un fait qui se produit à l'occasion du service mais qui est étranger au service."[27] It is here that we touch the point. According to the civil law rule, when the act of the préposé arises out of his employment—"à l'occasion du service"—the commettant is liable. According to the administrative rule the act done "à l'occasion du service" will, if it is a bad enough act, be a fait personnel for which the state is not liable. Let me give three illustrations:

(1) A teacher in a government school, in the course of his teaching, uses language grossly insulting to the Roman Catholic religion and to the French army. This is fait personnel for which the state is not liable to the parents of the pupils.[28]

(2) The ringing of the church bells is, in France, a matter minutely regulated by "arrêtés." We have to distinguish between civil bell ringings—"sonneries civiles"—and religious bell ringings—"sonneries religieuses." The principle is that, on religious occasions, the bells are to be rung only by direction of the curé. The "maire" may order them to be rung in certain carefully specified cases, such as to give warning of a common peril, and also on some special occasions when there is a local usage of ringing the church bells, for instance, upon special local holidays. When the "maire" ordered the bells to be rung at the burial of a suicide, which was a civil and not a religious burial—an "enterrement civil"—was this a fait personnel? It was a "sonnerie civile" and one not provided for by the law. Nor was there a local usage of suicide or of bell ringing at the burial of a suicide. The Tribunal des Conflits and the Conseil d'État take opposite views upon this matter.[29]

(3) Two doctors in the employment of the state, whose duty it was to examine passengers before their disembarkation from a ship, compelled a young woman to go to a quarantine hospital upon the ground that they suspected her of having yellow fever. She

26. *Hauriou*, "Droit Administratif," 8th ed., p. 94; *Jèze*, Revue du Droit Public, 1909, p. 274.
27. See *Hauriou*, l. c. and the references.
28. Trib. des Conflits, 2 juin 1908, *Sirey* (1908), 3, 81.
29. Trib. des Conflits, 22 avril 1907, *Sirey* (1909), 3, 1.

was pregnant at the time and died as a consequence of her removal and of the shock. The diagnosis of the doctors had been entirely wrong, and her removal to the hospital was made against the strong protest of the ship's doctor. The act of the state doctors was a fait personnel, because it was so monstrous.[30]

Taking these illustrations as typical, are the new rules of the administrative courts more equitable than the rules of the civil law? I think not. Why should the actual wrongdoer enjoy immunity because his act was an "acte administratif"? The rule of the civil law that every person is liable for his own fault is more wholesome. It is better for officials to know that they enjoy no charmed existence. When the state is liable it may not be very important to the plaintiff to get a judgment against the official as well, but I see no reason in equity why he should not be allowed to do so. If the fine-spun theory of "faute de service" restricts the liability of the state and makes it less than that of an ordinary commettant, and, in fact, as appears from the above instances, this is one of the consequences of the theory, is this a desirable result? I think not. And, lastly, upon what grounds, upon what grounds of equity, or, indeed, of common sense should we excuse the state because the fault of its official was exceptionally gross? Why should the victim have a good claim against the state for the act of an official if this act was wrongful but was not a gross fault, whereas his only remedy is against the official himself if the act was a "faute lourde"?

One could understand this point of view if by faute lourde the courts meant a wrongful act which was unconnected with the official duties. The civil law rule that the master is not liable when the servant's act was not "dans l'exercise de ses fonctions" is a just rule. But in all these three cases the wrongful act was done by the official in his official character. The teacher was teaching his class. When a maire orders the bells to be rung it is certainly as a maire that he acts. He may be grossly mistaken as to his powers, but his act is not a merely private and personal act, as if a policeman were to commit a burglary when away upon a holiday. You or I cannot order church bells to be rung. The quarantine doctors may have acted in a most monstrous manner, but it was not as private persons that they sent a woman from a ship to a yellow fever hospital. She went there, as she understood, in obedience to the orders of the state and under compulsion.

These arguments ab inconvenienti would have little weight if

30. Trib. des Conflits, 15 mars 1902, *Dalloz* (1903), 3, 93.

the French courts were applying unambiguous rules of positive law by which they were bound. But if they are, as they insist, perfectly free to do justice according to their own views of equity, then I cannot help thinking that they have achieved a very moderate degree of success. The old theory that the state is like any ordinary commettant may be open to criticism from the scientific standpoint, but it leads to practical results which seem to be preferable to those at which the administrative courts have arrived by adopting a new theory.

The champions of the administrative courts point out that the exceptional freedom in which these courts find themselves is capable of being made use of in unexpected directions. If the French administrative courts are not bound by the civil law rules, they may become powerful engines of reform in the whole matter of the relations between the state and the citizen. The wide equitable powers which they possess make it, theoretically, possible for them to grant remedies for grievances for which no legal remedy has as yet been admitted. Take, by way of illustration, the burning question of granting indemnities to the sufferers by the war. Up to the present time the law has been understood to be that if a man's house or other property was destroyed by the enemy, or by the army of his own state during military operations, he had no redress. For the acts of the enemy the state has no liability. For the acts of its own officers it is covered by the plea of military necessity. In both cases there is force majeure. The state might make grants to the victims of such losses, but if it did so, this was "à titre gracieux." It is now contended by some French authorities that, even as the law now stands, the administrative courts would be entitled to grant indemnities even as a matter of right.[31]

The reasons urged are numerous but the chief of them are, firstly, that these losses are as it were public burdens, and that it is a rule of law that public burdens shall be imposed equally; and, secondly, that this destruction of property is done in the common interest and that those who benefit thereby ought to contribute proportionately as in the case of general average losses—"avaries communes"—in the maritime law. If one village is ruined in this way, this is in order to save other neighboring villages, and, indeed, if we take a wide view, to save all other villages in the country. These

31. *Jèze, G.*, in Revue du Droit Public, 1915, p. 5. [See also the article of M. Duguit in this collection of essays; see further *Jacquelin*, "Le Droit Social et la réparation des dommages en régions envahies," Paris, Sirey, 1917.—Ed.]

arguments have some slight speciousness when the damage was caused by the army of the state to which the victim belongs, though I do not believe they are sound even here, but they are of no force at all when it was the army of the enemy which caused the loss. For most certainly, the enemy had no thought of imposing a tax or of sacrificing the goods of "A" to save those of "B." But to give relief to a French farmer whose house had been burned down by the French army and to refuse relief to his neighbor, whose house had been shelled by the Germans, would be making an unjust and arbitrary distinction.

The only satisfactory solution of the problem must be one which treats the two classes of victims alike. What is the difference from the point of view of equity if my mill at St. Quentin was shelled by French or by German guns? I do not think for a moment that the French courts will admit the legality of such claims, however great may be their sympathy for the sufferers. It is a case for legislative not for juridical remedies. But the interesting and ingenious contentions of a writer as competent as M. Jèze suggest many possibilities. The administrative courts might undoubtedly go to great lengths in affording new remedies. Fortunately, or unfortunately, courts are by nature pretty conservative.

Upon the whole, there will, I think, remain in the minds of the English or American lawyers considerable doubt as to the merits of French administrative law upon this important matter of the responsibility of the state. If the rules of the ordinary law are in themselves just and reasonable there is as much to be said for applying them as they are to the state as to any other employer, and if the ordinary rules are not reasonable they should be amended for everybody. Nor is it by any means a bad thing that officials should know that unless they walk warily they will incur personal liability. It may be that under a jury system officials are sometimes harshly treated. But, after all, the protection of the individual citizen is the most important thing. The continental system tends unduly to protect the official class and to encourage them to think that they are as a class sacrosanct. The cases where in England or in America an official is made to pay damages for an act done in good faith and in a reasonable manner are very uncommon. When they occur it should be possible, and it usually is so, to find a way to shift the burden and to provide the official with an indemnity at the public expense.

PART III
CRIMINOLOGY

REVISION OF THE CHINESE CRIMINAL CODE

By Chung-Hui Wang[1]

Vengeance, which for centuries has been the basis of all punishments, only accentuated the danger of the presence of the predatory types of humanity; but with the rise of criminology as a science within comparatively recent years the entire outlook has been altered. The object of punishment is now no longer vengeance, it is rather the elimination of the crime through the reformation of the criminal; so that there has been a revision of the penal codes of nearly every civilized land during the last two or three decades. This reform, if slower in Switzerland, Austria, and Germany than elsewhere, is receiving in these countries even more assiduous and scientific consideration. In Asia, Japan adopted a new criminal code in 1907, Siam in 1908, and China is busy overhauling her penal laws.

Up to a few years ago China had the oldest criminal code in force—a collection of rules and precedents which had been handed down from dynasty to dynasty. The various alterations made from time to time in this collection marked the progress of the nation's development. Thus twenty centuries before Christ we read in the "Shu Ching" (Canon of History) of the "statutory punishments" of the Emperor Shun. These were primitive and vindictive; they consisted for the most part of various forms of mutilation. In the year 950 B. C. the aged King Mu introduced certain reforms, chiefly in the direction of limiting the infliction of the death penalty and

1. [Born in Kuangtung, China, 1881; like many other oriental scholars he has resided at various American and European seats of learning; is a member of several European learned societies, including the Société de Legislation Comparée; was Delegate of China to the First International Bills of Exchange Conference at The Hague, 1910; Minister of Justice, 1912; and now President of the Law Codification Commission. He is the translator into English of the German Civil Code, London, 1907. To those of us trained in a single language and a single system of law this must appear as an incomparable achievement. He is also joint author of the section on China in "Handelsgesetze des Erdballs."—Ed.]

establishing a system of fines, but the first regular penal code in China is attributed to Li-Kuai (B. C. 249). This code embodied and simplified pre-existing legal principles. Various other codes were issued at different periods, but the general character of the law remained unchanged. The first code in the western sense was compiled by the Emperor Yung Lo (A. D. 1403-25). It is the foundation of the well-known "Ta Ching Lü Li" (Laws and Statutes of the Great Ching Dynasty) which remained in force from A. D. 1647-1912, modified only by edicts applying the law to particular cases. In spite of its many defects and the Draconian character of some of its provisions it has been considered to be one of the best codes of the time. Sir George Staunton, who translated the "Laws" into English in 1810,[2] said:

> "By far the most remarkable thing in this code is its great reasonableness, clearness, and consistency, the business-like brevity and directness of the various provisions, and the plainness and moderation in which they are expressed. . . . . The legal maxim de minimis non curat lex is not known in China; much minute attention is paid to trifles. We scarcely know any European code that is at once so copious and so consistent, or that is so nearly free from intricacy, bigotry, and fiction. In everything relating to political freedom or individual independence, it is indeed woefully defective; but for the repression of disorder and the gentle coercion of a vast population, it appears to be equally mild and efficacious."

In the later years of the reign of Kuang Hsü a number of changes were made in the criminal law lessening the severity with which criminals had up to that time been treated; deportation was abolished, torture prohibited, the use of the cangue forbidden, and corporal punishments made commutable by fine. These reforms were, however, piecemeal. No real attempt was made to remedy the many remaining abuses until the continued pressure of the reform movement culminated in the promulgation of the "Programme of the Nine Years' Preparation for Constitutional Government, 1908-1917." Independence of the judiciary and revision of the codes were the watchwords of the constitutional propagandists. The Bureau for Law Reform ("Hsiu Ting Fa Lü Kuan") was established for the purpose of revising and codifying the laws. The first draft of a new criminal code was finished in 1907, and the final draft, after several revisions, in 1910. It was an adaptation of Japanese law to local needs and circumstances. The first part of the draft[3] was promulgated by Imperial edict shortly before the

2. French and Spanish translations appeared later.
3. v. infra.

Revolution, and excepting those provisions relating to the imperial family, the whole draft was promulgated by presidential order on March 3, 1912, as the "Provisional Criminal Code of the Republic of China." This code is still in force.[4]

The successor to the Bureau for Law Reform is the Law Codification Commission ("Fa Lü Pien Cha Hui") which was appointed in 1914. The commission presented its first revised draft of the Criminal Code in 1916. It has just completed a second revised draft[5] incorporating such amendments and additions as the application of the code and a study of comparative criminal law have shown to be necessary. It is divided into two parts. Part I contains the "General Provisions," Part II deals with "Specific Offenses and Their Punishments." The plan of this monograph is to discuss seriatim the principles of the fourteen chapters of the General Provisions.

I. Application of Criminal Law in General[6]

Strict Interpretation

Article 1[7] (Article 10 of the Provisional Criminal Code) provides that "no act shall be an offense unless expressly made punishable by the law in force at the time when it was done." It introduces the maxim "nullum crimen sine lege, nulla poena sine lege," which is a radical change in Chinese criminal jurisprudence. Chinese judges had always been in the habit of interpreting the law by analogy, that is, if the law did not exactly cover a given case, they would so adapt it as to make it apply. While this secured the punishment of a greater number of criminals than is possible under western rules of strict interpretation, it not infrequently caused the punishment of the innocent—a state of things which disappeared with the new code.

Criminal Law with Reference to Time

"Application of criminal law with reference to time" has attracted comparatively little attention from English and American writers; among continental jurists, however, its discussion has given rise to different schools. The question is: If one law is in

4. The Ministry of Justice published an English translation in 1915.

5. English and French translations will appear shortly.

6. Among the subjects dealt with in this chapter only three of more general interest have been selected for notice here.

7. Unless otherwise stated, the articles are those of the Second Revised Draft.

force at the time of the offense and another at the time of the trial, which law shall be applied? Adopting the classification of Dr. Träger,[8] we have four solutions:

(1) The law at the time of the offense prevails, irrespective of any subsequent law. This rule obtains in England and in several states of the American union.

(2) The law at the time of the offense prevails, unless the law at the time of the trial is more favorable to the accused, in which case the more favorable law is applied. This rule obtains in most of the countries of continental Europe, in Egypt, Japan, Siam, in several of the South American republics, and in a few states of the American union.

(3) The law at the time of the trial prevails, unless the law at the time of the offense is more favorable to the accused, in which case the more favorable law is applied. This rule obtains in Austria and in several of the Swiss cantons.

(4) The law at the time of the trial prevails, irrespective of any previous law. This rule obtains in China, in Russia,[9] and in several of the Swiss cantons.

Much subtle reasoning has been advanced in favor of the fourth solution, but being an ex post facto law it is contrary to Anglo-American notions of justice. Some jurists have maintained that where a law has been altered the new law must be the better law; and that, as a matter of state policy, the better law should, in every case, prevail; that, in a word, the change of the old law is itself the strongest argument in favor of the new. This argument, though plausible, fails to take into account that an ex post facto law is an injustice to the offender when it inflicts the heavier penalty. The Second Revised Draft adopts the third solution as a compromise between the first and the fourth. The provision reads (Article 2): "Where the law in force at the time of the trial differs from the law in force at the time of the offense, the law in force at the time of the trial shall be applied, but if the punishment prescribed by the law at the time of the offense is the lighter, such punishment shall be inflicted."

CRIMINAL LAW WITH REFERENCE TO PLACE

Article 3 lays down the principle of the territoriality of criminal law, and the three succeeding articles provide for the exceptions.

8. "Vergleichende Darstellung des deutschen und ausländischen Strafrechts," Allgemeiner Teil, Bd. VI, ss. 323-332.

9. Subject to minor exceptions.

The first exception is that offenses against the president, against the internal security of the state, against the external security of the state, and those relating to false coins are punishable by whomsoever and wheresoever committed. Extra-territorial jurisdiction over these offenses is recognized in almost every country, on the theory of self-preservation. Piracy also comes under this category on the theory of cosmopolitan justice.

The second exception includes malfeasance in office, escape of prisoners, and offenses relating to false documents wheresoever committed by any person in the service of the government.

The third exception, as provided by the Provisional Code, after the example of Japanese law, enumerates seventeen extra-territorial offenses which are punishable if committed by any Chinese citizen, or by any alien against Chinese citizens. This principle, which exists in several codes,[10] has been attacked by American and English publicists as a violation of the territorial jurisdiction of a foreign state, but by continental writers has been justified on the personal theory of jurisdiction, namely that "each state has a right to the obedience of its own subjects wheresoever they may be."[11] The Second Revised Draft both extends and limits the application of this principle. It extends it in so far as it abolishes the list of enumerated crimes and lays down a general rule to include all serious offenses, such as are punishable with imprisonment of not less than one year; it limits it by two provisos: First, that the act must be punishable under the law of the place where it was done, and second, that the offender has not been convicted by a final judgment in a foreign tribunal, or, in case of conviction, that the sentence of a foreign tribunal has not been executed or remitted. This meets to a great extent the objections of the strict adherents to the territorial principle and is also in consonance with justice.

II. Definitions

"Lineal ascendants," "collateral ascendants," "relatives," "public officer," "public document," "grievous bodily harm," are defined in Chapter 2. They require no special treatment here.

10. Japan (Arts. 2 and 3), Hungary (Arts. 7 and 9), Italy (Art. 6), Russia (Art. 9), Norway (Art. 12), Swiss Draft of 1903 (Art. 6), and German Preliminary Draft of 1909 (Art. 4).

11. *Holland*, "Jurisprudence," p. 424. The punishment of aliens who have committed offenses abroad against nationals has been upheld on the theory of self-preservation.

III. Computation of Periods of Time

A day is twenty-four hours, a month is thirty days, a year is twelve months. In calculating the period during which a sentence runs "a year" means a calendar year, the old lunar calendar having been displaced by the Gregorian since January 1, 1912.

IV. Criminal Liability and Reduction or Remission of Punishments

Under this heading three chapters of the Provisional Code are consolidated. The general rule of criminal liability, as laid down in Article 18, is that an act is an offense only if done intentionally, except where negligence is specifically made punishable. Ignorance of law is no excuse, but the penalty may be reduced by one-half according to the nature and circumstances of the case.

The grounds of exemption are: (1) *Age.* No act of a person under twelve years of age is punishable, but he may be sent to a reformatory, or placed under the supervision of a guardian for three years, upon the latter furnishing security for the good behavior of his ward. In the case of offenders between the ages of twelve and sixteen, or above the age of eighty, the penalty may be reduced by one-half. The lenient treatment on account of old age, which has always been the law in China, accords with Chinese respect for advancing years. (2) *Insanity.* An offender who is non compos mentis at the time of the offense can only be subjected to precautionary measures restrictive of his liberty. The Second Revised Draft, following recent legislation, admits feeble-mindedness as a ground for discretionary reduction of penalty, but after execution of sentence precautionary measures restrictive of liberty may, as in the case of the insane, be ordered by the court. (3) *Intoxication.* Unless caused without the knowledge or consent of the offender, intoxication cannot be set up as a defense. (4) *Infirmity.* Reduction of penalty is permitted in the case of congenital deafness and dumbness. (5) *Legality.* An act done in accordance with any law or ordinance, or in the proper exercise of a lawful occupation, is not punishable. (6) *Command by a Superior.* A public officer who does anything under the orders of his superior in the exercise of his duties is not criminally liable. (7) *Self-Defense.* An act done in necessary self-defense, or in the defense of another, is not punishable unless the force used is excessive, in which case the penalty may be reduced or remitted. (8) *Imminent Danger.* An act done to avert imminent danger to life, body,

liberty, or property, which danger could not have been averted otherwise, is not punishable, provided that no more damage is done than was necessary in the circumstances. If the damage done was greater than the threatening danger necessitated, the court has discretionary power to reduce or remit the prescribed penalty. This provision, which exists in more than one European code, is an effort to solve a question not yet authoritatively settled in England and America. (9) *Voluntary Surrender to Justice.* When a culprit, before the discovery of an offense, voluntarily surrenders himself for trial, the penalty may be reduced by one-third. In this way the provisions of the old laws, which were very elaborate owing to the lack of an efficient police and detective force, have been simplified and embodied in the new code.

V. Attempt

The law in France by which an attempt is liable to the same penalty as the consummation of the offense, has not been generally followed by other countries, for the reason that, as Beccaria has remarked, "the importance of preventing an attempt at a crime justifies a punishment; but as there may be an interval between the attempt and the execution, the reservation of a greater punishment for a consummated crime may present a motive for its non-completion."[12] The Provisional Code, while admitting the soundness of this principle, allows a discretionary but not an obligatory reduction by one-half of the penalty prescribed for the offense. The reduction is not obligatory so that exceptional cases may be punished as severely as the offense itself. Attempt is punishable only in more serious crimes, as provided in the second part of the code. About one-half of the offenses (three-fourths in the existing code) are thus made punishable.

Impossibility of committing an offense does not prevent an act from being an attempt. In the Second Revised Draft an exception is made for absolute impossibility, by allowing the court full discretion to reduce or remit the penalty. Voluntary desistance from the commission of an offense also gives the court discretionary power to reduce or remit punishment. Simple preparatory acts are not punishable except in three or four of the most serious offenses; for instance, offenses against the president, against the internal or external security of the state.

12. Chapter XIV. Quoted in *Phillips'* "Comparative Criminal Jurisprudence," Vol. I, "The Penal Law."

VI. Participation in the Commission of an Offense

The participators in an offense, besides the principal, are instigators and accessories. Where several persons jointly commit an offense they are each deemed to be principals (joint principals).

An instigator is he who incites the culprit; an instigator of an instigator is also deemed to be an instigator. Instigation is liable to the same punishment as if the instigator had himself committed the offense. Instigation, being a dangerous encouragement to crime, has always been treated under Chinese law with great severity. The same strict rule is also found in several continental codes.

An accessory is he who aids and abets in the commission of an offense. The existing code makes a distinction between an accessory before and during the commission; the latter being subject to the penalty prescribed for the offense, while the former is liable to the same penalty with discretionary power of reduction within limits. In the Second Revised Draft the penalty for an accessory before the commission of the offense is changed from a discretionary to a compulsory reduction by one-half, and the penalty for an accessory during the commission of the offense is the same as for the offense itself only where the aiding and abetting is direct and material.

VII. Punishments

The whole system of multiform punishments has been reformed. The new Code recognizes only two, principal and accessory.

Principal punishments are: (a) death;[13] death sentences must be approved by the Ministry of Justice before execution; (b) imprisonment for life; (c) imprisonment for a period of from two months to fifteen years; in case of reduction the minimum may be less than two months, and in case of increase the maximum may amount to twenty years; (d) detention of from one day to two months. In case of increase the maximum may be more than two months. A sentence of imprisonment or detention includes hard labor, which may, however, be remitted by the prison authorities when the condition of the offender makes such remission advisable. (e) Fine of one yuan or upwards. Fines must be paid within a month after judgment has become final, and when the

13. By strangulation. In Chinese eyes severance of the head from the body is degrading.

fine is heavy the court may use its discretion as to allowing payment by instalments within a year. When a fine is not paid, confinement in lieu of fine cannot exceed one year.[14]

Accessory punishments are: (a) deprivation of political rights[15] (this may be for life or for a period varying from one to fifteen years); (b) suspension of political rights during the term of imprisonment; (c) forfeiture of any article connected with the commission of an offense.[16]

VIII. Recidive

A person guilty of recidive is subject to enhanced punishment. There are two schools as to what constitutes recidive; the one holds that the repetition of an offense after sentence has been passed,[17] the other that the repetition of an offense after a sentence has been executed,[18] is recidive. The Chinese Code follows the second school, since the necessity for enhanced punishment can be justified only by the fact that after execution the ordinary punishment has not proved a sufficient deterrent to the offender.

The conditions of recidive as set forth in the Code are: that the second offense must be one for which the lowest penalty is imprisonment, and that the second offense must be committed within five years after the date of the completion of a sentence of imprisonment for a period, or after the date of remission of punishment in case of partial execution of sentence of imprisonment for life or for a period.

The Second Revised Draft makes a distinction between special recidive, i.e., repetition of the same or a similar offense, and general recidive, i.e., repetition of a different offense. The punishment for the former is heavier than for the latter.

IX. Concurrence of Offenses

Where a person is guilty of several distinct offenses the consideration of the proper sentence to be inflicted constitutes what is

14. Under the Provisional Code, three years.

15. Political rights are: (1) The right to hold public office; (2) the right to vote, or to be voted for in an election authorized by law; (3) the right to wear decorations; (4) the right to serve in the army or navy; (5) the right to be a principal, to be a teacher, or to hold any office in a government or public educational institution.

16. A general forfeiture of the offender's property is no longer allowable under the Code.

17. In countries which follow French law.

18. In countries which follow German law.

known as "concurrence of offenses." The law on this subject may be classed under three main principles.

(1) The Principle of Merger ("Absorptionsprinzip") according to which the offender is liable to the punishment prescribed for the most serious offense, the punishments for the other offenses being merged in it.[19] This is the law in France which provides[20] that "en cas de conviction de plusieurs crimes ou délits,[21] la peine la plus forte sera seule prononcée." Leniency is the mainspring of this principle, but it defeats the very purpose of punishment; for, so long as the first offense remains undiscovered, the subsequent commission of minor offenses does not involve any heavier penalty.

(2) The Principle of Cumulative Penalty ("Kumulationsprinzip") by which the offender is liable to a separate penalty for each separate offense. This is the practice in England and America. In England, however, the judge is allowed discretionary power to make the sentences run concurrently, in which case he sails between Scylla and Charybdis, going from the one extreme of cumulative penalty to the other extreme of merger. The objection to cumulative penalty is that before a culprit has suffered the pains and penalties of the law, he has met with nothing which should stimulate him to reform, and that consequently a long sentence, the result of cumulative penalty, may work undue hardship.

(3) The Principle of Limited Aggravation ("Asperationsprinzip") appears in various forms. Discarding details, we may state in general terms that the offender is liable to a collective penalty ("Gesamtstrafe") which must not be less than the penalty prescribed for the most serious offense, nor more than the sum total of the several penalties. This is the generally accepted rule in countries other than England, America, and France. It was adopted by the Provisional Code, and is incorporated in the Second Revised Draft. By way of illustration we reproduce Article 56:

"A separate sentence shall be passed for each separate offense, and the sentence to be executed shall be determined by the judge in accordance with the following rules:

(1) In case the heaviest sentence is death, no other sentence shall be executed, except accessory punishments.

(2) In case the heaviest sentence is imprisonment for life, no

19. The merger is of the punishment, not of the offense. This is important in the case of pardon.

20. Art. 365, subs. 2, Code d'Instruction Criminelle.

21. "Contraventions" are governed by the principle of cumulative penalty.

other sentence shall be executed, except fines and accessory punishments.

(3) In case of several sentences of imprisonment for a period, the sentence to be executed shall not be lighter than the heaviest sentence, nor heavier than the sum total of all the sentences, but in no case can it exceed twenty years.

(4) Rule 3 applies mutatis mutandis to several sentences of detention.

(5) In case of several sentences of fines, the sentence to be executed shall not be less than the heaviest fine, nor more than the sum total of all the fines.

(6) Sentences determined in accordance with rules 3 to 5 shall run cumulatively.

(7) In case of several sentences of deprivation of political rights for a period, the sentence to be executed shall be that for the longest period.

(8) In case of several sentences of forfeiture, the sentences shall run cumulatively."

Limited aggravation is, according to this article, subject to exceptions; where the penalties are of different kinds, as for instance in rules 1 and 2 (as regards accessory punishments), in rule 2 (as regards fine), and in rules 6 and 8, the principle of cumulative penalty is followed. It is obvious that the objections to this principle do not apply to these cases.

These rules, though somewhat complicated, in practice work out more justly than the principles of merger and cumulative penalty.

X. Judicial Discretion Regarding Punishments

To fit the punishment to the crime so that the severity of the one shall be commensurate with the seriousness of the other is always a matter of more or less difficulty. A judge, no more than other men, can avoid the unconscious influence of personal prejudices when determining a sentence. He therefore needs legal criteria to enable him to properly decide as to the gravity of an offense and the criminal propensities of an offender. The Second Revised Draft, following the example of the Swiss Draft of 1903 and the German Preliminary Draft of 1909 directs the judge to take into consideration the following particulars, having due regard to all the circumstances of the case:

(1) The criminal intent of the offender at the time of the offense.

(2) The motive for the offense.

(3) The provocation, if any, which led to the offense.

(4) The physical condition of the offender and his relation to the injured party.

(5) The economic condition of the offender.

(6) The past life of the offender.

(7) The intelligence of the offender.

(8) The effect of the offense.

(9) The conduct of the offender, subsequent to the commission of the offense.

When a fine is imposed the property qualifications of the offender must also be taken into consideration.

In the Chinese Code the minimum penalty provided may, in exceptional cases, be too severe for the offense; to remedy this, Article 63 empowers the judge to reduce the prescribed penalty by at least one-half if, on considering all the circumstances, he deems such reduction just and equitable.[22]

XI. Rules for the Increase or Reduction of Punishments

The Second Revised Draft provides rules for the increase or reduction of punishments. A death penalty cannot be increased, but a reduction of such penalty by one-third is imprisonment for life, and by one-half imprisonment for from twelve to twenty years. A life sentence cannot be increased, but a reduction of such sentence by one-third is imprisonment for from ten to fifteen years, and by one-half imprisonment for from seven to twelve years. An increase or a reduction of imprisonment for a period, of detention, or of a fine, means a corresponding increase or reduction of both maximum and minimum.

This "legal arithmetic"[23] has been condemned as an unworthy shackle on judicial discretion, a degradation of a purely legal question to the dead level of mere figures. Of course, where the judge has an array of precedents extending over a great many years by which he can obtain guidance, such rules may not be necessary, but experience has shown that where the code has been only recently revised there is a need for a system of increase or reduction of punishments by fractions.[24]

22. Cf. Article 66 of the Japanese Penal Code.

23. Cf. article, "Strafzumessung in vergl. Darstellung des deutschen u. ausländ. Strafrechts."

24. The new codes of Holland, Italy, Japan, and Siam adopt this system.

XII. Postponement of Punishment

Postponement of punishment forms, under different names, a part of criminal administration in almost every system of law. The Provisional Code brought it into operation in China for the first time.

The conditions of postponement in the Second Revised Draft are: (1) that the offense is punishable with imprisonment for a period not exceeding two years, detention, or fine;[25] and (2) that the offender has not been convicted of an offense for which the lowest penalty is detention, or that in case he has been found guilty of a prior offense a period of three or five years has not elapsed since his release. The judge has power to fix the period of postponement at from three to five years.

Postponement may be revoked for the commission of a fresh offense, or for conviction of an offense committed before postponement. If after the period of postponement has elapsed there has been no revocation the legal effect of the sentence comes to an end ipso jure. It follows that the commission of a new offense after the lapse of the period of postponement without revocation is not recidive.

XIII. Conditional Release

The application of conditional release has been extended in the Second Revised Draft by relaxing some of the restrictions of the Provisional Code.

A convict who has served part of his sentence may, if the prison authorities are satisfied that he has amended his ways, be conditionally released with the sanction of the Ministry of Justice. He must, however, have spent at least ten years in prison in case of a life sentence, or half the term in case of a sentence of imprisonment for a period, but in no case can he be released before the expiration of two years. Commission of an offense during the probationary period (except those punishable with detention or fine), or a violation of any of the rules of supervision over convicts on probation, may cause a cancellation of the release, in which case the remainder of the term must be served as if there had been no release.

XIV. Prescription

Prescription in criminal law is practically unknown in America or England where, subject to a few statutory exceptions, the rule

25. The code now in force excludes fines.

"nullum tempus occurrit regi" still obtains. In most other countries, however, it has been found expedient to establish a complete system of prescription for all offenses, both as regards the right of prosecuting the offender and of executing the sentence. The period for the latter is usually longer than for the former. A review of the various theories in justification of lapse of time as a bar to the exercise of legal right is impossible within the limits of this monograph, but it cannot be denied that most of the reasons for prescription in civil law apply with equal force and logic to prescription in criminal law; and that, furthermore, a prosecution or execution for a crime which the public has forgotten may prove harmful rather than beneficial to public peace and order. Perhaps no one single theory is satisfactory in all respects, but when all are considered together the necessity of prescription becomes apparent.

The Provisional Code fixes six periods for the right of prosecution and eight for the right of execution. The Second Revised Draft reduces these periods to five, ranging from one to twenty years for a prosecution and from two to thirty years for an execution.

Prescription of the right to prosecute is "interrupted" by commencement of proceedings, such as preliminary search, preliminary examination, prosecution, and trial; it is "suspended" during the time for which the commencement or continuation of such proceedings becomes impossible by operation of law. The difference between "interruption" and "suspension" is that when a prescription is interrupted the period begins de novo after the interruption, but when it is suspended the time which has already expired is added to the period which runs after the suspension. There are similar provisions of interruption and suspension as regards the right to execute the sentence.

As an interrupted prescription begins de novo, it is evident that successive interruptions would defeat the very object for which prescription is established. The Second Revised Draft, therefore, provides that it shall be complete after twice the original period of prescription has expired. This is in accord with the tendency of recent legislation in Belgium,[26] Italy, Russia, Mexico, the Swiss Draft, and the German Preliminary Draft.[27]

It will be interesting to note one or two salient features of the Chinese Code. Like the Japanese and Siamese codes it rejects

26. Law of April 17, 1878.

27. The Commission Draft ("Kommissionsentwurf") of 1913, instead of setting a definite limit, authorizes the court to fix the final period of interrupted prescription.

all such classifications of crimes as treason, felony, and misdemeanor in English law, "Verbrechen," "Vergehen," and "Uebertretung" in German law, and "crimes," "délits," and "contraventions" in French law. This is partly due to the fact that any such classification, arising as it does partly from historical causes and partly from differences in procedure, is by its very nature not only technical, but more or less arbitrary. It would be absurd, when framing a new code, to imitate technicalities which might lead to a conflict between law and fact; for instance, from the legal point of view, felony is a graver offense than misdemeanor, yet misdemeanor is sometimes more severely punished than felony. For these reasons, among others, China has discarded anything corresponding to a threefold classification.

The reproduction in the Chinese code of the chief characteristics of continental rather than of Anglo-American law, requires explanation. This choice on the part of the codifiers is not accidental. It is the result of mature deliberation. Anglo-American law emphasizes the individual at the expense of the family, while continental law inherits something of the old "familia." The family being the unit of Chinese society, anything which weakens the existence and power of that institution must be as unacceptable in principle as it would be unworkable in practice. Again, English jurisprudence is permeated by case law. To imitate the English common law as developed by judicial interpretation and modified by statutory enactments would be a difficult, if not an unprofitable, task. To copy a ready-made code of comprehensive rules clearly and concisely set forth article by article, is not only simpler and more systematic, but a more promising method of obtaining satisfactory results.

To pass from the "Ta Tsing Lü Li" to the Provisional Code was a bold and revolutionary step. The change would not have been so easily effected had it not been for the political upheaval in 1911, when with surprising swiftness old things passed away and all things became new. For a time there was a complete break of continuity. The judges had at first much difficulty in applying the new code, having no precedents to guide them; notwithstanding these difficulties, it has worked much more satisfactorily than many expected. With the accumulation of decided cases, and with the gradual adaptation of the people to new thoughts and ideals the ready reception in China of a modern system of law is assured. The experimental stage has now happily passed. The political storms of which much is sometimes heard are only surface waves which do not hinder the onward progress of the flowing tide.

THE CONCEPT OF PUNISHMENT

By Ugo Conti[1]

Summary: 1. Criminal law and punishment; 2. The basis of criminal law; 3. The purpose of punishment; 4. Ideas; 5. The impossibility of an indeterminate sentence; 6. Penal proportion.

I

Although every juridical norm consists, by common consent, of a command and a sanction, there is only one in which the sanction is raised to such importance, that its name, and not that of the command, is given to the norm itself—penal law.[2] This is also true of the corresponding law of procedure. Many penologists scorn the argument for punishment as an argument coming from the idle talk of philosophers or from the inexperience of dilettanti.[3] Nevertheless, there is a question as to the fundamental argument for a juridical science, which, together with the law to which it refers, properly takes the name of punishment. Criminal law is a complex mass of rules of public law which fortify the prohibition of crime by a threat of punishment, and in substance, may be said to be a part of the public law of the state which is opposed to the public law which guarantees freedom for the individual.

---

1. [Born at Bologna (Italy) Dec. 4, 1864; formerly professor of Penal Law and Procedure at the Royal University of Cagliari, the Royal University of Messina, and the Superior Commercial Institute at Rome; now ordinary professor of Penal Law and Procedure at the Royal University of Modena; often appointed delegate of the Italian Government to international penitentiary congresses (e. g., Washington, 1910). Among his numerous publications are: "Juvenile Criminals" (1888-1914); "The Impulses to Crime" (1887-1900); "Penal Law and Its Natural Limits" (1911-1916); "Imputability and the Grounds Which Exclude or Diminish It" (1890, 465 pp.); "The New Italian Criminal Procedure" (1903, 119 pp.); "Punishment and the Penal System of the Italian Code" (1910, 970 pp.). Professor Conti has been in military service since Italy's declaration of war on Austria, and is now superior officer in charge at the Military Court of Appeals in Rome.

This translation (from the Italian) is by Cornelia Wyse of the Chicago bar.—Ed.]

2. The expression, "criminal law," however, which is used, suggests the violation of a law to which the sanction is opposed, and this is also used in speaking of the juridical norm in general.

3. For example, see *Vannini*, "La scienza del diritto penale e la polemica fra le cosidette scuole, 'classica, positiva, eclettica, giuridica,'" in Riv. Pen. Vol. LXXXV, p. 224.

But punishment in a broader sense is directed not only against crime or violation of the juridical order which has already occurred, but also against the inherent criminal dangerousness, or the corresponding tendency of the individual to commit new crimes. Crime is followed by punishment, and the dangerous criminal tendency is met by a measure of security which has the function of a *complement of punishment*. For the sake of logical completeness, in addition to the act, we must consider the individual himself as the author of the crime, and, finally, the individual simply as the author of the *act* which constitutes the crime, or of a crime that is not complete subjectively or objectively, but is nevertheless a revelation of a criminal tendency which should be checked. The establishment of the fact of a crime or of an inherent dangerous criminal tendency implies, then, in the same sense, the existence of a law of procedure alongside the substantive law—a law of procedure (objective and subjective) which is *jurisdictional* in so far as it pertains to the inquiry as to the crime, and *administrative* in so far as it pertains to the inquiry as to the mere inherent dangerous criminal tendency.

The science of criminal law is in harmony with the phenomena which underlie it, and, in a strict sense, includes the theory of crime and the theory of punishment (in the strictest sense, criminal law and the law of punishment, respectively) together constituting *criminal law proper*. Besides, it includes a supplemental *criminal penitentiary law* aimed especially at the regulation of the punishment that is applied to the author of the crime. Finally it includes, in a broad sense, a *criminal law of police regulation,* concerned with the true complement of punishment on account of the dangerous criminal tendency inferred from the crime and a *criminal law of police regulation,* concerned with the complement of punishment which gives concrete support to the punishment itself because of the dangerous criminal tendency inferred merely from the *criminal act*. And because procedure is also involved, there is then a *jurisdictional law of criminal procedure* with reference to criminal law in a strict sense, and, in addition, an *administrative law of criminal procedure* with reference to criminal law in a broad sense. The *general science of criminal law* may be said to be that which also includes the biological and sociological presuppositions of crime, or so-called *criminology*.[4]

4. See *Conti*, "Diritto penale e suoi limiti naturali"; "Le ultime sistemazioni proposte"; "Concetto della pericolosità 'criminale'"; "Giurisdizione e

We shall again take up briefly the doctrine of punishment, stopping only to settle upon the most exact concept possible of the institution of punishment. Besides the positive law of each country, we still have to develop a "theory of punishment," derived solely from the actual nature of the facts. This means that a theory should be developed by a legal method, but not with bare formalism which leaves theory out of consideration, as well as an intelligent view of the facts, and reduces the scientific inquiry more than ever to empty scholasticism.

II

The doctrine of punishment presupposes a recognized criminal law. At any rate, the sound basis for criminal law has no need of being demonstrated. Social phenomena, like natural phenomena, are what they are, and after their nature has been determined, there only remains for us the study of their possible positive manifestations. From the most ancient times philosophers have sought for the reason for law, and especially the justification of punishment in the sense of criminal law. But the innumerable different theories of the basis of criminal law may be reduced to two main principles, the utilitarian principle and the principle of justice, principles which are characteristically distinguished by their respective methods, prevention and retribution; prevention or retribution being regarded as the basis of punishment, and therefore of criminal law which sets a certain punishment over against a certain crime. And they are further distinguished by one or the other special purpose of punishment which takes its origin from either prevention or retribution, since punishment is legitimate only in so far as it tends to reach some definite end.[5] But the utilitarian conception is too general to be accepted, and the criterion depending on prevention is also faulty. These theories are not convincing as to the purposes assigned to punishment, viz., social defense, psychological compulsion, intimidation, or reform, and the like, since there can be no defense in the face of a completed act, and punishment is not so

amministrazione"; "Procedimento amministrativo" (1911-1916), and also "Pena e complemento di pena," in Riv. pen., Vol. LXXX, fasc. v; "La Pena e il sistema penale del codice italiano," in *Pessina*, "Enciclopedia del diritto penale italiano," Vol. IV (a second edition, completely revised, is in preparation).

5. See also: *Conti*, "Sull' opera scientifica di Enrico Pessina," in Riv. di discipl. carcer. e correttive, P. P., an. XLI, pp. 294-295. And cf.: *Rocco*, "La pena e le altre sanzioni giuridiche," in Riv. pen., Vol. LXXXV, pp. 330-331.

efficacious as a means of psychological compulsion, intimidation, reform, etc., as to raise these individual purposes up into essential elements of punishment. On the other hand, absolute justice is metaphysical justice and therefore unacceptable as a principle of law, and the criterion derived from retribution fails through the fault of its origin. These theories are not convincing as to the respective purpose assigned by them to punishment (which is a legal safeguard), inasmuch as their appeal is to transcendental considerations.

As we shall point out more clearly a little further on, punishment has its own specific, characteristic, and essential purpose. It serves to restore the public peace that has been disturbed by crime and in this purpose punishment has an adequate basis, viz., complete repression, and this is the basis of the positive justice of criminal law, by which civilized are distinguished from primitive peoples. Among the sanctions in the field of law, punishment is the sanction of crime, a sanction here in the sense of a threatened evil which is inflicted upon the occurrence of the act. The threat of punishment ought to act as a deterrent against the commission of crime, like the threat of every other legal sanction opposed to unlawful acts. But crime occurs, nevertheless, just as other unlawful acts occur, and the commission of crime is followed by the infliction of punishment, just as other unlawful acts are followed by their respective sanctions. In particular, as we have said, punishment is inflicted in order to restore the peace that has been disturbed by crime, like other legal sanctions inflicted for a proper purpose which may ordinarily be seen in the reparation for a private injury accompanying an unlawful act.[6] The special nature of crime demands the sanction of punishment, and this punishment, as a threat, has the general natural aim of prevention, but, as a threat of punishment to be inflicted, or in its entirety, it has the specific aim of public reparation.

Because of the nature of punishment, the two stages of its infliction, viz., the application and the execution, should be carefully distinguished. The threat of punishment, its application, and execution, together have the aim of restoring the public peace, as has already been pointed out. Crime as a disturbance of the public order is, therefore, a violation of the juridical order, and an attack upon the social order itself. Punishment reconstructs the foundations of human society by quieting the disturbance caused by the crime, and restores the juridical order that has been violated. The

6. On this "reparation," cf. *Rocco,* loc. cit. [note 5, supra], pp. 329-331, 339-342, 347, 348.

characteristic signs, without absolute value in differentiating punishment from other legal sanctions, are not necessarily followed by the accomplishment of the specific purpose of punishment; but this purpose, above everything else, determines the nature of punishment and therefore its sound basis, the basis common to every system of criminal law.

Necessity is no longer spoken of merely as a law of public welfare, which gives rise to a prevention that confuses punishment with police regulations for security, attributing to punishment one-sided and problematical ends, viz., intimidation, reform, and so on. On the other hand, necessity is no longer spoken of as a rational absolute law, wholly outside reality, giving punishment the indefinite significance of retribution, and in no case separating the legal penal institution clearly enough from the contiguous spheres of ethics and religion. We speak of a natural necessity that is both utilitarian and just in a positive sense: social conservation through the protection of law, and especially through punishment, which restores the peace that has been disturbed by crime.

However, the leaders of the so-called positive school of criminal law adhere to the utilitarian doctrine, which in the name of social defense unites punishment and a measure of security in a single concept of prevention, forgetting that crime is an act to be repressed, while a dangerous criminal tendency is merely a condition of the individual that indicates a possibility of crime. As has already been pointed out, punishment may be reinforced by a complement of punishment, and there will thereby be added to the legal sanction of crime a measure of security against the dangerous criminal tendency (the dangerous criminal tendency proper, and the dangerous criminal tendency in a broad sense). The threat of punishment is indeed a preventive, but, at both of the successive stages when it is applied and when it is carried into effect, repression is a necessary element, and the complement of punishment also is a preventive, and, in so far as it actually follows punishment or is substituted for it, prevention is still a necessary element.

The boundaries of criminal law are thus enlarged to allow the devlopment of its natural basis. To preserve the public peace that has been attacked and threatened is its province.

III

For us, then, the purpose of punishment is to restore the public peace that has been disturbed by crime. If punishment stops with

the threat because there is no disturbance yet to make amends for, the threat alone serves to maintain the public peace as a guaranty that punishment will be inflicted as soon as a crime is committed.

By juridical order is meant the complex mass of laws that regulate the conduct of the state and of individuals in order to attain individual and social ends, and the peaceful condition which the state wishes to be guaranteed is the result of this juridical order, and to it may be traced all the harmony of human society. After a crime has been committed there is no other means of bringing back peace except to inflict punishment, an act of authority opposed to an act of rebellion. No doubt the objection could be raised that after a crime has been committed in spite of the law's threat, punishment no longer has the ultimate object of prevention, but is only concerned with the idea of restoring the public peace. Since a crime that has already been committed cannot be undone, what is the purpose of punishment if not to prevent other crimes? And is not faith in the preventive power of punishment the real cause of the return of peace? The infliction of punishment tends to strengthen the authority of the state, and thereby, the authority of the law, rather than to prevent crimes (always a desirable but uncertain result). Every sanction that is applied in the field of law is a reassertion of law itself. In criminal law, for the reason that the whole system of law has been denied, this reassertion of law is complete and impressive and it makes the occasion significant.

Outside the field of criminal law the enforcement of a legal sanction makes amends for an injury, and punishment also makes amends for an injury when it aims at the restoration of the public tranquility that has been disturbed. In both cases we are confronted by an anti-juridical act that has already been committed. The threat of punishment had the prevention of crime for its aim; since failure was the result of this threat, prevention necessarily gives place to repression. The immediate need is this, to re-establish the power of the law, and punishment answers such a need. We might well wish that punishment had a preventive effect on the criminal through reform or elimination, and on third persons through intimidation, but this is not the most important element of punishment, which, above everything else, has jurisdiction over a past state of affairs.

Likewise, if punishment is regarded as a means of preventing crime, a simple act of faith furnishes no reason for the return of

the public peace; this return of peace is the result of an act, a positive act, viz., the reassertion of law by means of punishment. Repression is a public reproval of crime, and the preventive force of repression is a fortunate contingency of punishment. A simple anti-juridical act does not require so much, but a crime demands a reassertion of law. And punishment, which is such a reassertion of law, is not revenge, because it is not evil for evil, but evil for the sake of the greatest good possible—peace, through the formal public recognition of the law after it has been violated. When punishment is no longer sufficient, we may have recourse to a measure of security. But punishment is always what it is, and it is only made complete by a measure of security against any possible relapses into violation of the law that has been declared, so that in any case the public peace may be maintained effectively. The object of punishment, therefore, is to restore the public peace that has been disturbed by crime; the object of the complement of punishment is to check new crimes on the part of the individual; the object of punishment and of the complement of punishment together is to preserve the public peace in the face of crime and of any inherent dangerous criminal tendency.

Rocco, in the recent article which has already been referred to,[7] after analyzing the purposes and characteristics which in his opinion are common to all legal sanctions, both at the time when these sanctions are created and when they are applied, is able to assign a specific purpose to punishment at the time it is inflicted, just like the specific purposes of other legal sanctions from which they derive their characteristic qualities. Not unlike other legal sanctions, when punishment is carried into effect, it inspires fear and gives confidence, both as a general and a special preventive; but the specific and peculiar purpose of punishment is elimination, or the adaptation of the individual to society, just as the specific and peculiar purpose of other legal sanctions is to make amends for an injury. Rocco does not expressly state that the essential element of punishment lies in the specific and peculiar purpose suggested by him; but if punishment is distinguished from the other legal sanctions in that it is intended to accomplish such a purpose, viz., special prevention, and if its peculiar characteristics have their origin in this purpose, it seems that this no doubt explains what the essential element of punishment is, viz., a means of reforming or eliminating the offender. Naturally the criminal anthropo-

7. Loc. cit. [note 5, supra], pp. 329-349.

logical school is pleased with this view of Rocco's, but Grispigni, a famous jurist,[8] could not help saying that, considering the principles of that illustrious writer, his view "does not appear to be quite legitimate," as such an opinion is not only legitimate but necessary according to the principles of the above-mentioned school.[9] And it is true that the positivists, who justify punishment as a measure of security, agree that prevention is its purpose, but they do not agree that this purpose, which belongs especially to measures of security, should be attributed to punishment, as peculiar to it, by one who makes a proper distinction between punishment and administrative precautionary measures, and who denies that this precautionary measure has the character of a legal sanction.[10]

Rocco is the leader of the group of neo-classicists who think they should limit themselves to the reconstruction of positive criminal law through legal criticism, and who accept the principles of the traditional doctrine pure and simple, while they even adopt the method of the old jurists, the analysis of the juridical norm. In particular, the neo-classicists have the merit of abandoning every metaphysical basis of the doctrine, but they make the mistake of stopping at law in civitate positum, and, as a result, they have given up the positive search for law in the process of formation. They are obsessed with a holy horror of any contact with philosophy, social ethics, etc., and they exaggerate the formalistic criterion that was already faulty in itself.

Now the prevailing Italian system of criminal law which has been elaborated by the neo-classicists does not regard punishment as a special instrument of prevention, or of adaptation or elimination of the individual. The present system of law does take the individual dangerous criminal tendency into account, but it always keeps the act in the foreground. The rules concerning punishment, imputability, attempts, the entire calendar of delinquency and crime, recidivism, like the rules about particular crimes, always lay down these three principles: that in every case a crime should have its punishment, that an anti-juridical act should bring with it its own sanction, and that punishment should therefore be in proportion to the crime. How, then, can we reconcile such principles with the assertion that punishment is a means of adaptation or elimination of the individual, an assertion such as reduces crime merely to a symptom of its author's dangerous criminal tendency?

8. Review of *Rocco's* article in Sc. posit., an. XXVII, pp. 331-337.
9. P. 335 of the review.
10. Pp. 332-333 of *Rocco's* article [see note 5, supra].

See how inconsistent Rocco, the authoritative exponent of our present legal doctrine, is (aside from express and clear reservations that he does not make), with Rocco who shouts a new word, "criminal anthropology!"

The answer could not be given that Rocco is faithful to the legal method as he understands it when he stops at the analysis of institutions as they are, without examining their bases. Every institution has its own individual character, and if punishment, according to present Italian legislation in regard to crime, is not an institution in itself, but only a subdivision of a larger group of measures of security, then Rocco can not maintain that punishment *is* such an institution in so far at it brings about the reform or the elimination of the agent in a specific and individual way. It might be said that, whatever his method, Rocco first defined punishment in general as a legal sanction, and then pointed out a definite and distinctive purpose. But does not his definition of a legal sanction agree with the definition of a measure of security? The observation is worth something; but if punishment is kept separate from measures of security, the statement that punishment is essentially a means of reforming or segregating the criminal is inaccurate.

The theory of reform is also an old one, but now it has finally been given up even in practice.[11] The utilitarian concept of prevention[12] was only supported by following to a certain extent the theory of justice,[13] and even that was only in isolated cases and it had little weight. This view takes into consideration only one side of the question of punishment, viz., the man himself, and this is not of chief importance, but only secondary. By reducing punishment to a mere individual course of treatment, he forgets that punishment is in its nature a reassertion of law, of the state's authority, of never-ending social coercion, with reference to third persons, rather than to the individual who is punished. Punishment is a reaction against an act, the act of a human being, but always an act, and it is desirable that punishment should be supplemented by a measure of security, which results from a consideration of the person who has committed the act. No one will deny that crime reveals an inherent dangerous tendency of an individual better than any other anti-juridical act, and this suggests

11. As to America, see *Conti* and *Prins*, "European Opinion of American Prisons," in the Journal of the American Institute of Criminal Law and Criminology, 1911, Vol. II, p. 207.

12. *Röder*, "Zur Rechtsbegründung der Besserungsstrafe" (1846).

13. *Henke*, "Ueber den Streit der Strafrechtstheorien" (1811).

that an attempt might be made to reform him or that he should be segregated. Punishment is opposed to crime, but only in the sense of the best possible adaptation to the individual. The law, the judge, and the one who actually carries the punishment into effect, all aim at making the punishment a sanction of the crime, and also a means of reform or of elimination by individualizing the punishment as much as possible and by having final recourse to "complements of punishment."

Prevention is a natural result of the principle of repression and nothing more. Punishment is always primarily the particular sanction that is opposed to crime, and its function is to nullify its effect. The distinction just made is confirmed by the marks that after a certain point differentiate punishment from other legal sanctions. How can a mere legal sanction like punishment pretend to accomplish the very highest and most difficult of all objects, the moral regeneration of the individual? On the other hand, how can the elimination of the individual be the immediate object of a judgment which has neither the character, moral purpose, nor effects of a police regulation? Crime demands its reaction, punishment, which, in reacting against the crime, also reacts against the dangerous tendency of the individual evidenced by the crime, and when this comes to the attention of the law, we have the ultimate segregation of the most dangerous criminals, the care of defective delinquents, and the reform of immature offenders. Thus punishment is always the sanction of crime, a legal sanction especially intended to quiet the social disturbance that follows crime.

IV

A sanction speaks in the language of the law. It is the promise of a good, or, more frequently, the threat of an evil, according to whether a law has been observed or transgressed. We can speak of a purely social sanction, and especially of a natural sanction, only in a metaphorical sense. Like every other legal sanction, punishment is an evil to an individual because of a prohibited act that he has committed. Theoretically, it is an evil that is simply threatened, and actually it is an evil that is inflicted upon the individual by a competent authority who applies the sanction and administers it.

After this, we can not say, in order to give a clear idea of punishment, that it is the extreme legal sanction which is enforced because of an unlawful act where other sanctions seem inade-

quate. Punishment, then, is an evil which threatens an individual with reference to a special prohibition of the law, viz., the prohibition of crime (an abstract notion of punishment), and it is the intention that this threat be translated into action whenever there is a violation of a legal command (the concrete notion of punishment). In other words, punishment is an evil which is threatened and inflicted upon the individual by the state because of a crime. As a sanction opposed to crime, punishment is directed against a voluntary individual action, and it affects the individual agent, unlike other legal sanctions which are directed against even innocent actions and which affect other persons besides the agent. This is what is meant by the suggestions that were made in regard to the purpose of punishment, which always bears a relation to the nature of the particular illegal act, the crime. But punishment, regarded as essentially a means of causing suffering to an individual, has no certain characteristics which differentiate it from other legal sanctions. It affects an individual, it is strictly personal and is direct discipline by the state, usually in proportion to the crime, but all this does not distinguish it clearly from the other legal sanctions, and it is necessary to trace it to its object in order to find its essential distinguishing mark.

However, punishment, an evil, opposed to crime, an evil, produces a good result, for, as we know, it restores the public peace that has been disturbed by crime, and the individual suffering is reduced to just that minimum of physical and moral repression which seems sufficient to make amends for the public injury. Punishment is threatened by the law; and this defining of punishment by law represents the necessary guaranty of the rights of liberty of the individual and it should be kept precise in so far as the common legal conscience at any one time and place is concerned. According to this criterion, the infliction of punishment should be entrusted to a special judicial authority that will interpret the laws in strict conformity to the principles of law, and in applying and administering punishment, this authority and the instrumentalities which supplement it ought to endeavor to adapt the laws of social reaction to the individual action. Thus the state, the agency of the law, administers justice and has jurisdiction in criminal matters over every person within its territory.

Crime like punishment, is defined by law, and the preliminary establishment of the fact of the crime, like the infliction of punishment, is accomplished through the work of a criminal judicial

authority. In brief, punishment is the special sanction opposed to crime, and since the law defines both punishment and crime, punishment is the correlative legal sanction of an act which the law defines as a crime. All this may be reduced to one simple legal idea of punishment and of crime. If punishment has no peculiar characteristics which clearly differentiate it in a definite way from the other legal sanctions, it, nevertheless, has a special purpose which is its essential element. For punishment is a reaction against a criminal act and its purpose is to restore the peace which has been disturbed. The teleological element thus serves to define the institution, for the purely theoretical idea of punishment does not exist independently, but it also includes the idea of crime to which punishment is opposed. We have a clear idea of crime, rather general but nevertheless sufficient to distinguish it from other anti-juridical acts, for we regard it as a violation of the entire juridical order and the cause of such a general disturbance as to shake the very foundations of our social existence. Crime is simply an act to which the law makes punishment the correlative, while punishment, in turn, is the sanction which the law makes the correlative of crime. We thus arrive at a relation which can not be defined, yet we nevertheless have a intelligent notion of the two terms when we use them.

Crime was at first confused with a simple tort, but now it is distinguished from other anti-juridical acts in that it is a violation of the juridical order, an act of public disturbance, and a direct offense against society, whether it is a direct violation of the juridical order, a true violation or crime [malum in se], or whether it is an indirect violation, merely a violation ["contravenzione"] of a police regulation [malum quia prohibitum]. And a further distinction is made between crime which springs from an anti-juridical motive ["delitto doloso"], whether the crime is merely attempted, unsuccessful, complete, or incomplete, and the more exceptional crime which is produced solely through the defective attention of the individual ["delitto colposo"]. In such a case the crime is not an act of aggression against the law, but is merely a voluntary act or omission which creates a danger of aggression.

The elements of every crime are a human being and a criminal act. There must be an individual (the subject) who is comparatively normal mentally and who is capable of understanding the command and the sanction, and of willing and acting accordingly, and a voluntary act or omission on his part which is a violation of the juridical order (the object). He must be chargeable with the

commission of a criminal act or be easily recognized as the author of a voluntary act which constitutes the crime and who is responsible to the extent that he is to blame for a delitto colposo and for a violation of a police regulation ["contravenzione"], and as far as he is actuated by anti-juridical motives he is responsible for a delitto doloso, his responsibility varying with the circumstances.[14]

Punishment is the correlative of crime. Besides punishment there may be a true complement of punishment for the purpose of checking any new criminal acts which the individual might possibly commit; or there may even be a "complement of punishment" in a broad sense, also for the purpose of checking any new criminal acts which the individual might be likely to commit, but which is employed only in cases where the agent, because of immaturity or some abnormality, is not liable to punishment, or where there can be no punishment because there has been no violation at all of the juridical order. Punishment and the complement of punishment together form a repressive institution with reference to crime and to the inherent dangerous criminal tendency. Punishment is a legal sanction, just as the measure of security is an administrative precaution for the sake of prevention (a police regulation). However, nothing prevents the same restrictive means from serving both as punishment and as a complement of punishment with reference to the personal liberty of the individual. The law which fixes punishment ought also to indicate which different measures of security are to function as complements of punishment, and it should specify the conditions under which these complements of punishment shall be used and the manner of putting them into effectual operation. These are provisions which are laws of police regulation and therefore are to be strictly interpreted, and they are binding upon everyone within the territory of the state. But the law can not define an inherent dangerous criminal tendency at all, while it necessarily defines crime. The definition of crime by the law is the major premise of the syllogism, the minor premise is the establishment of the certainty of the act which exactly constitutes the crime, and the sentence is the conclusion. The dangerous criminal tendency, on the other hand, is a fact which can be

14. *Conti*, "I moventi a delinquere e il codice penale italiano," Torino, 1897 (in Supplemento alla Rivista penale); "Ancora dei moventi a delinquere," Roma, 1897 (in Riv. di discipl.); "Nuove ricerche intorno ai moventi a delinquere," Torino, 1898 (in Riv. pen.); "Sempre dei moventi a delinquere," Torino, 1900 (in Riv. pen.). And see *Walter Wheeler Cook*, "Act, Intention and Motive in the Criminal Law," in the Yale Law Journal, Vol. XXVI (1916-1917).

defined in the abstract only by referring to a variety of concrete cases. It is an individual aptitude for crime which is inferred from an aggregation of different indications, and in each case one is free to maintain or deny that this aptitude exists. The idea of punishment is not changed, but in order to reach the most perfect agreement possible between the crime and the sanction opposed to it, the complement is added to the punishment on account of the dangerous tendency, and the idea of crime is thereby made complete.

V

We can not speak of an indeterminate sentence.[15] The "punishment," both in the abstract and concretely, is naturally determined by the crime. A measure of security, on the other hand, is always indeterminate, even when it is a complement of punishment, since its termination has to await the outcome of the "care" of the individual. An indeterminate sentence usually means a sentence which is not fixed precisely as to its length at the time it is pronounced, but its duration is made to depend upon the subsequent conduct of the individual, which serves as an index as to whether the purpose of reform has been accomplished or not. Punishments which are measured in time, especially prison sentences, are the principal ones affected. If the idea of the indeterminate sentence is restricted in concrete cases to the question of quantity alone, it does not admit of any limitations. If reform has been accomplished, the punishment should end; if reform has not been accomplished, the punishment should continue. There is no law, however, which accepts the doctrine of the indeterminate sentence without some limitation.

In 1876 a special reformatory was built in Elmira, N. Y., and a New York act of April 24th, 1877, provided that every person between the ages of sixteen and twenty, who should be sent there pursuant to a conviction for a felony, and who had no previous criminal record, should remain until, in the judgment of the director of the institution, he had reformed, but never longer than the maximum period fixed by law for the crime. In case of bad conduct he could be transferred to the state prison. In this way the

15. See also: *Conti*, "Sulla pena indeterminata," Rome, 1899; "Il sesto Congresso Penitenziario Internazionale," in Riv. pen. LIII, 341; "I complementi di pena," in Riv. di dir. e proced. penale, I, 1, 265; "Relazione sul Congresso Penitenziario Internazionale di Washington," in Riv. di. discipl. carcerarie, XXXVI, I, pp. 42-50; "Le prigioni americane," Roma, 1911, pp. 6-8.

system of the indeterminate sentence arose, and it has spread in different forms in the state mentioned and also in the other states of the Union, where its development is still going on today.[16] Here, then, the sentence is not absolutely indeterminate, since it is limited in each case to the maximum sentence allowed by the law for the crime, to say nothing of the possible transfer from the reformatory to the state prison.

On the other hand, the Norwegian plan of the criminal code of 1896 (§60) provides that the judge alone may fix a minimum sentence, subject to a reservation that it may be lengthened by a later judgment as to the dangerous tendency of the criminal, but never beyond certain limits and in no case for a period exceeding fifteen years. This may apply also to serious crimes even in the case of a first repetition, when the special causes of the crime are taken into consideration.[17] According to this plan, a sentence is not absolutely indeterminate, since in every case of crime the minimum sentence provided by law is necessary, and any prolongation is restricted to definite limits. This really means that the doctrine of the indeterminate sentence is accepted only in so far as it takes into consideration the principle that for every crime there is a corresponding punishment which is necessarily determinate; consequently, we have a sentence which is only relatively indeterminate. This system should be rejected for practical reasons on account of the danger which the freedom of the individual presents.[18] It seems to us that it is not correct to use the term, "indeterminate sentence," except in the sense of absolute indeterminateness; an indeterminate sentence, therefore, is an impossibility.

The so-called indeterminate sentence, the result of only relative indeterminateness, may be resolved into the ordinary course of punishment, including the idea of the *complement of punishment.*

As usual, repression should not be confused with prevention. The precautionary measures which are taken in regard to defective criminals and juvenile delinquents (as distinguished from criminal

16. Vide *Barrows,* "The Reformatory System in the United States," Washington, 1900; "Penal and Reformatory Institutions," in "Correction and Prevention," Russell Sage Foundation, Vol. II, New York, 1910; *Hall,* "Indeterminate Sentence and Release on Parole," in Journ. of Am. Inst. of Cr. Law and Crimin., 1912, Vol. II, p. 832; *Abbott,* "Indeterminate Sentence, Release on Parole and Pardon," in Journ. of Am. Inst. of Cr. Law and Crimin., 1915, Vol. VI, p. 73.

17. See *Lammasch,* "Der norwegische Strafgesetzentwurf," in Zeitschrift f. d. ges. Strafrechtswissenschaft, XIV, 365; *Urbye,* "Les sentences indéterminées dans le nouveau projet de code pénal norvégien," in Revue pénale suisse, XI, fasc. 1, 2 (Berne, 1898).

18. See *Alimena,* "Principii di diritto penale," Vol. II, pp. 96-98.

acts of normal persons) should be absolutely indeterminate. This is the field of the *complement of punishment* in a broad sense, wholly outside the domain of punishment. When the so-called indeterminate sentence is resolved into a plan for the reformation of the prisoner, as is the case in the United States, true punishment, susceptible of all kinds of modifications, lends itself to the purpose without losing its own character. When the so-called indeterminate sentence is resolved into a system for the elimination of the prisoner, like the plan of the Norwegian criminal code, punishment and the true complement of punishment answer this purpose more exactly. Accordingly, the Norwegian criminal code of 1902 (effective in 1905) corrects the weak feature of the plan by authorizing (§65) a possible combination of punishment with confinement as a measure of security after the sentence for the crime has been served.

Where, then, is the precise distinction between punishment and a complement of punishment, except in the difference of opinion as to whether the complement ought to follow or precede the sentence proper? But just as punishment ought to be absolutely determinate, so a measure of security ought to be absolutely indeterminate, but, of course, with the guaranties due the individual that the proceedings are regular and strictly according to law. The Norwegian code, however, in limiting the prolongation of the punishment to three times the length of the sentence, is inconsistent with this fundamental principle of a precautionary measure.

The Americans, however, inspired by a simple faith in the possibility of human reform, see in the indeterminate sentence an easy means of accomplishing this purpose. Rocco, in the article referred to, like the Norwegian code, sees in the indeterminate sentence only a method of elimination, and his is the last chapter of our colonial criminal law.[19]

Punishment is no longer punishment if it is shortened or lengthened in any way. The critical criminal code, in authorizing confinement for an indefinite time as a punishment for the native inhabitants,[20] really creates a "complement of punishment" from this indefinite confinement, by making it optional to add this to the sentence for the crime.[21]

Stoppato[22] is willing to accept the doctrine of the indeterminate sentence so far as it is indeterminate only in quantity, but with the

19. Pp. 343-344 of his article.
20. See especially art. 20.
21. See especially art. 104.
22. "Dell' element etico nel magistero penale," Bologna, 1896, pp. 21-23.

quality fixed. But as he sees in punishment the natural recompense of crime, he does not mean that he can accept a concept of indeterminateness, whatever it may be.

Punishment does not consist of quality only, but it may be more correctly said to consist of the amount of good of which an individual is deprived, as everyone thinks. This exactly applies to the duration of imprisonment. However modern the concept of punishment, it can not be separated from the recognition of the old rule: so much punishment for so great a crime. It is simply a question of making the penal proportion more exact, as we shall soon see at the close of these remarks. Moreover, even the defenders of the indeterminate sentence recognize the abstract proportion between crime and punishment, both in a general and a specific way, and deny only the concrete proportion. Here lies the contradiction. If it is a question of the proportion between an action and a reaction, this proportion can not be less exact at the time when it is actually established. But as we have said before, the "dangerous criminal tendency," which gives rise to special measures of security and special administrative procedure, is confused in practice with "crime," which gives rise to actual punishment and criminal jurisdictional procedure.

In the field of punishment the judge might well be authorized to choose sometimes between different species of punishment, and in every case to have a choice of disciplinary measures of the same species, sub-species, or unit of punishment (for example, in a case of temporary detention, there might be a choice between solitary confinement and simple imprisonment). He should always be given the greatest latitude in fixing the actual amount of the punishment. And in carrying out the punishment a variation of disciplinary measures might be allowed; for example, from solitary confinement to simple imprisonment, and even from simple imprisonment to solitary confinement. All this is in harmony with the concept of punishment as a reaction to a single human act.

A modification of punishment for young people, with especial attention to court procedure and to the carrying out of the sentence, is as much as we are able to accept when we take into consideration the transition from immaturity to maturity. Besides the considerations of age, today there is almost a distinction between a good and bad offender which affects the corresponding punitive sanctions. Thus, on the one hand, we have pseudo-crime and occasional crime; on the other, ordinary crime and the worse forms of ordi-

nary crime, frequent, habitual, or professional (not including of course, defective offenders). This distinction is drawn especially from the ethico-legal value of the motives. For example, in the case of a good highwayman, we might employ conditional liberation, the conditional sentence, and every other proper means of mitigating the punishment, while in the case of a bad highwayman a régime of just severity might culminate in a "complement of punishment," and so on without the necessity of having recourse to an erroneous conception of punishment which is not punishment at all. Besides, under the system of the indeterminate sentence, everything is subjected to the habitual hypocrisy of the prisoner, who can easily pretend to have reformed when the contrary is true. Everything depends upon the judgment of the last prison official who is called upon to give his opinion upon the serious question as to whether the prisoner has reformed or not. Consequently, even from this practical standpoint, punishment, when its essential attributes are considered, offers a better guaranty than the hybrid institution of the indeterminate sentence.

VI

Generally speaking, just as crime is the violation of the juridical order, so punishment is the restoration of the juridical order which has been violated, and, consequently, the restoration of the peace which has been disturbed, whereby human society is made possible. To be specific, just as crime is a denial or lessening of a particular juridical good, so punishment, in turn, is a denial or lessening of a particular juridical good to the author of the crime; and just as crime presents circumstances which differ appreciably from order, both objectively and subjectively, so punishment corresponds more or less to these circumstances in intensity and extent, except that the punishment is adapted to the individual case to the greatest possible extent.

Penal proportion consists of this, a proportion in quality, quantity, and degree, to use a traditional phraseology[23] in order to make it agree with our own concept. Crime, then, is regarded by the law as a denial or lessening of a particular juridical good ("quality"); then considered in both a general and particular way in its principle circumstances ("quantity"); and as a whole made definite within the limits we have already mentioned ("degree"). And

23. See *Carrara*, "Programma," §§ 128, 652.

punishment corresponds to the crime in that it is a denial or lessening of a particular juridical good to the author of the crime ("quality"), commensurate with the circumstances of the crime ("quantity"), and, with reference to the one human act, determinate within the limits already mentioned ("degree"). By the criterion of quality, a legitimate restriction is made to correspond to an illegitimate restriction, but this does not mean that the two restrictions are identical, whereby in retaliation we should have a duplication of an evil. By the criterion of quality, crime is measured by the punishment already assigned to it.

The degree of punishment is only the recognition and concrete embodiment of an abstract proportion, both of quality and of quantity, between crime and punishment. We therefore see how impossible it is to accept the doctrine of the indeterminate sentence, which denies the element of degree, or of a concrete proportion, especially the quantitative proportion of punishment to crime. Punishment can be and should be perfectly adapted to the act and to its author by means of standards of degree. While we speak the impossibility of an indeterminate sentence, others maintain that penal proportion is an impossibility. In particular, it is said that a proportion between punishment and crime is impossible because punishment and crime are heterogeneous terms.[24] But proportion is a relation between terms which are dependent upon each other and which vary with each other in the same way. Punishment depends exactly upon the crime, it varies with it, and it has the same rhythmic variation. Nothing more is necessary to have a proportion, even in a mathematical sense. The critics say, then, that if punishment and crime are considered homogeneous terms, punishment is therefore a duplication of evil. But a duplication would be a vindictive reaction and never a reaction that would establish the power of the law by bringing peace back to human society.

Finally, after these criticisms, the conclusion is reached that crime and punishment have an equal right to exist. And then what? We know that crime is a constant social phenomenon and we know that punishment is one of the least efficacious means of lessening this phenomenon, and yet a reassertion of the authority of the state after a crime is necessary, and it is desirable that punishment should be accompanied by an increased preventive power. However, penal proportion is not a failure, according to this criticism, for this proportion is becoming better understood as

24. *Bovio,* "Saggio critico del diritto penale," Napoli, 1877.

an essential to a complete reconstructive effort after a social disturbance. Therefore, may not punishment be a proper means of social defense, as others say?[25] We have already called attention to the impropriety of the term "defense" with reference to an act which has already been committed. The conception of a proper means of social conservation includes punishment as a measure of security. Punishment is a special legal sanction, while, as we know, a measure of security is a special administrative precaution. Punishment is the response to an act; a complement of punishment or measure of security takes only the author of the act into consideration and seeks to prevent a relapse into crime. But punishment is an adaptation; it is an adaptation just so far as there is proportion. Punishment that is in proportion to the act is an adaptation of a special legal reaction to the crime and to its author. Punishment, moreover, is not a concept of criminal law alone, but also of other special branches of law, and of law in general, of custom, of religion, and even of natural law. Even if the proportion between crime and punishment is not the same thing, for example, as the proportion between sin and repentence, yet the universal acceptation of the concept of proportion nevertheless shows that this concept has the recognized merit of precision.

There is penal proportion in all the stages of punishment: in the threat of punishment for crime which the law makes and formulates comprehensively so as to provide for every possible adaptation; in the application of the punishment by a judge who is a specialist in the subject of crime and criminals, aided by an individualized procedure; in the execution of the punishment by means of suitable agencies under the direction of the judge after an investigation has been made as to the personality of the prisoner. When necessary, punishment should be supplemented by further precautionary measures which belong to the province of police regulation. This should be done according to a proper procedure. The different kinds of punishment given should always be in harmony with the idea of proportion. There should be a scale of punishments to correspond with a scale of crimes. These punishments are usually those which place restrictions upon the personal liberty

25. *Berenini,* "Teoria delle pene," in *Cogliolo,* "Compl. tratt. teor. e prat. di diritto penale," Vol. I, par. ii, especially pp. 200 ff. And see also *Dorado,* "Acerca de la base de la función penal," in Rev. gen. de legisl. y jurispr., LI, 22; "Sobre la proporción penal," in Rev. de crim. psiq. y med. legal, III, 624.

26. *Jhering,* "Der Zweck im Recht," Leipzig, 1886, §§ 202-211, and especially § 204.

of the criminal, those which forbid him from filling certain offices or following certain professions, and pecuniary punishments, together with a completely organized penitentiary system. As alternatives to punishment there are various substitutes for punishment: hard labor, public censure, and conditional release. Besides punishment there may be also a complement of punishment.

The element of proportion can not be taken away from the harshness of the amount in the face of a concrete act, while there may be changes in the quality through the positive doctrine degree of punishment. The concept of punishment includes the idea of determinateness and of an exact proportion to crime.

For the sake of third persons as well as for the criminal, for the purpose of repression as well as for prevention, which is coordinate, punishment varies from the maximum of life imprisonment to the minimum of a simple substitute for punishment, always in accordance with the principle of proportion. A complement of punishment can not be commensurate with the crime, for a complement is directed against an inherent dangerous criminal tendency, but when punishment is made complete by a penal complement, this complement of punishment thereby becomes an element of penal proportion.

PART IV
LEGAL EDUCATION

SOME ESSENTIALS OF A MODERN LEGAL EDUCATION

By JOHN BRADLEY WINSLOW[1]

As I write the title of this paper I am forcibly reminded of the education of the average lawyer of the middle west forty-five years ago, and of the things then deemed essential thereto. At that time, I presume (though I have made no investigation) that there were not more than eight or ten law schools in the country, and most of these were in the East. Those which were located west of Ann Arbor were very few and feeble. The great mass of lawyers in the middle west still relied upon the old-fashioned method of "reading law" in a law office as the road to admission. Under this plan the young man, having obtained a high school education or something approaching thereto, went into the office of some more or less successful lawyer in his home town, and received the privilege of reading Kent, Blackstone, and other stray textbooks chosen by himself, in return for his service in copying pleadings, contracts, and other papers, running errands, building fires, and sweeping out the office.

After a year or two spent in desultory reading of this nature, generally with no personal attention on the part of the lawyer, a motion for his admission would be made in the local nisi prius court, an examining committee appointed, composed of personal friends, and, after a perfunctory examination, an order made admitting him to the bar and clothing him with full authority to advise his fellow men on the most delicate and difficult affairs of life, and conduct for them any lawsuit however important. The picture is by no means overdrawn. Indeed persons were frequently admitted whose preparation had consisted simply of some experience as justice of the peace, or in the office of the clerk of the court or the sheriff,

1. [Born in Livingston County, N. Y., Oct. 4, 1851; A. B., Racine (Wis.) College, 1871 (A. M., 1874); LL. B., University of Wisconsin, 1875 (LL. D., 1904); city attorney of Racine (Wis.), 1880-3; judge First Judicial Circuit (Wis.), 1884-91; justice Supreme Court of Wisconsin since May 6, 1891 (chief justice since Dec. 30, 1907). He is author of "Story of a Great Court" —a history of the Supreme Court of Wisconsin from 1848 to 1880.—ED.]

during which they had gained some fragmentary knowledge of court procedure and developed some familiarity with legal terminology.

Now and then a young man would add to his course of reading in the office a year's course in a law school and thus obtain something more nearly approaching a logical and systematic knowledge of substantive legal principles and the methods of their application to the business of life, but even here there was an appalling lack of attention paid to the philosophy of the law. I remember my own course of one year in a law school very well. We received excellent lectures on real estate, contracts, pleading, evidence, and were finally examined on these subjects. We had no instruction on the history, development, or philosophy of the law, no suggestion that political economy had any bearing on it, and no mention was made of our duties to society, to the oppressed, and to the courts.

There has been a great advance made in legal education since those distant days. The great majority of the bar now obtain their education in the law schools, and the proportion is increasing every year. Furthermore, many of the law schools have become real colleges, with courses on all the major subjects, and requiring an attendance of three and sometimes four years before graduation. Their entrance requirements in the way of general education are much higher than they were, especially in the schools connected with the great universities. Courses of study along historical and philosophical lines have been introduced in many of the larger institutions, and it can not be doubted that this tendency will increase year by year. Nevertheless, there are still many law students who do not attend law schools, and indeed there are still many law schools with low entrance requirements, which pay little or no attention to the history or philosophy of the law, and ignore the very real connection between the science of the law and the sciences of economics and sociology.

I believe it to be a matter of the greatest importance to the modern lawyer that he have some education on these great subjects if he is to be more than a mere pettifogger and money grubber, and it is of this subject that I would briefly speak. There were two revolutions in the latter part of the nineteenth century and the opening years of the present century, namely, the industrial revolution which began with the steam engine and achieved a decisive victory with the advent of the dynamo, and the revolution in scientific thought and processes which has substituted for sweeping gen-

eralizations based on little exact information, results based upon careful study of great stores of accurate information obtained by observation of thousands of actual instances by trained investigators. Both of these revolutions have had a very real bearing on the science of the law, but amid the cares of professional life it seems very doubtful whether many of the bar appreciate the fact.

The economic revolution has greatly emphasized the inequalities of opportunity and ability between citizens and made necessary much new and complicated legislation to correct the same, as well as to regulate and control big business; and the revolution in methods of scientific research has made sociology a science with which every man who would intelligently perform the functions of modern citizenship ought to have some acquaintance.

The great interests of the world today are economic. Whether for good or ill we have made "business" our chief concern. Nations seek for foreign commerce as once they sought for the fabled land where gold was as plentiful as iron. The industrial revolution emphasizes the commercial bent of our civilization, indeed it may be considered as largely responsible for it, because without the great shop and without modern means of transportation and communication no such commerce as we now see would be possible. It would naturally be expected that in such an age legislation would deal very largely with economic subjects or at least would have an economic cast and such we find to be the fact. Many of our great number of new laws are really but applied economics. The whole field of regulation of public utilities both as to the rates and as to the quality of service is an economic field. Unless the legislation in this field be founded on substantially correct economic principles, and unless the administration thereof be in the hands of men who have economic training it can not be permanently successful. Much, if not all, of the labor legislation involves economic questions to a greater or less extent; the question as to the best method of taxation is of course purely economic, and the great fields of conservation of natural wealth and regulating or preventing business combinations are essentially, if not wholly, economic fields. Indeed it would be difficult to name any branch of modern legislative activity which has not more or less to do with economic questions.

So with regard to the science of sociology, by which I mean in brief the science of society, or the science embracing all of the relations of men and women to each other and to the state; it also has been advancing in these modern days; and, with the great

increase of urban life, and the consequent crowding together of great masses of people, its problems have become more complicated and their solution more important. In this field as in the field of economics there are many workers. They demand, and rightly demand, that in the legislation now projected or in process of enactment tending towards equality of political rights between the sexes, and towards the correction of inequality of conditions and opportunities, they be heard because they have given these questions study in the light of modern conditions. Indeed it seems that in legislating on questions of such overwhelming importance to the race it would be folly to reject the help of any one who has given them serious and conscientious study from any point of view.

Consider for a moment the question of the punishment of crime. The sociologist tells us and with truth that our time-honored system of dealing out a certain term of imprisonment to any offender young or old is not merely illogical, but foolishly, not to say criminally, so; it is as if a physician were to prescribe an unvarying medicine for the cure of every patient whose temperature reaches 102 degrees, regardless of all other symptoms. He tells us further that each criminal case is an individual case; that the court should not only have the power, but the means, by the employment of experts if necessary, of investigating the question of criminal responsibility and ascertaining whether the criminal act be the result of deliberate criminal intent or of abnormal or defective intellect; and that the matter of the punishment should be flexible and easily adapted to meet all circumstances, so that if possible the individual may be rescued rather than lost to society. He tells us also that medicine, pathology, and psychology have in these later years thrown a flood of light on human motives and the causes of human action. He tells us that when we are making or administering laws concerning divorce, or hours of labor, or sanitation, or the minimum wage, or concerning many other subjects of similar nature, we are dealing with sociological questions, and that we have too frequently done it in the past without the benefit of sociological knowledge.

Nor do the economists and sociologists stop here. Only a few decades ago the lawyers were practically the only professional men who made any serious attempt to grapple in a legislative way with governmental, economic, and social problems. But they are by no means alone now. The man of science, whether economic or sociological, is no longer confining himself to the scholar's closet or hiding his light under a bushel. There may not be great num-

bers of scientists who are actually members of legislative bodies, but they are making their influence felt wherever legislation bearing on economic or sociological subjects is pending. Their books are on the shelves of every library, newspapers are at their command and pamphlets bear their ideas to every reading citizen. To these earnest spirits precedent has no sacredness and novelty no danger; to them what seems like wrong *is* wrong, however long it may have existed; they have all the courage of their convictions; they are intense and eager; they would have the ills which they so plainly see corrected at once, and they have little patience with delay or with any view which postpones immediate or radical action.

There can be no good objection urged by anyone to this activity of the scientists; it is rather to be welcomed. There can not be too much activity of thought among a free and intelligent people; truth is always the gainer by full and free discussion of any question. In the end we shall unquestionably gain by comparison of the diverse views of trained minds which have come to maturity under radically different influences and which view questions from different standpoints. Nevertheless, the activity of the scientists bears several very definite lessons to the twentieth century lawyer and of these I would speak.

We shall infallibly have much legislation proposed along new and untried lines, and much of it will be placed upon the statute book; there will be an inevitable inclination to disregard or encroach upon constitutional commands and prohibitions in the eager and generous enthusiasm of the moment. There will be much need of what may be called constructive conservatism, a conservatism which, while holding to the good which exists in the present laws and institutions, recognizes that serious defects exist and is ready with clear vision and open mind to co-operate with the enthusiast and the radical in devising remedies for such defects, rejecting at once the clamor of the professional agitator and the stolid complacency of the man who can see no political wisdom except that of the fathers. This will be no easy task; it will be a task only to be performed by an upright, courageous, and learned bar, and a bar which, as a whole, commands the respect of the people. No other bar can retain the leadership in legislation which the profession has so long enjoyed. The blind can not lead the blind without imminent danger of disaster, and he who attempts to lead in legislation dealing with the most complicated social and economic problems which the world ever saw must have some intelligent, not

to say expert, knowledge of what these problems mean. This brings me to the point, namely, the lawyer who is to deal with these questions in a legislative way, who is to meet the economist and sociologist in debate and be a leader of his fellow legislators, can not hope to do so relying for his preparation on his legal education alone, I mean legal education as we now understand the term. No matter how conscientious or thorough may be his study of many legal textbooks or decided cases, it can not fit him for the task. His vision must be far broader than the vision of the technical lawyer, in a word he should be a *learned* lawyer in the sense that he knows something more than the mere rules of law and this means that he should be a student of economics and sociology. He ought to know what the leaders in these sciences have to say, the conclusions at which they have arrived, the data on which those conclusions are based and the arguments which they use to support their positions. It is not that he is bound to agree with all their conclusions or to become the partisan of this or that economic theory, but simply that he should have the benefit of the expert thought of the world on the subject if he is to legislate thereon, and especially if he is to bear anything like a leading part in such legislation. This thought is not by any means new nor does it seem to me to be either radical or extraordinary, but simply a matter of plain common sense, about on a par with the thought that an artist should study his art or a tradesman his trade before he assumes to ask the world for patronage.

But it may be said, and with truth, that only a very small percentage of lawyers become legislators, and from this it may be argued that for the great body of the profession who expect simply to practice law, time spent in the study of economics or sociology would be time wasted. A sufficient answer to this objection would seem to be that it is quite impossible to tell which of our law students are to become legislators, and hence that all should be educated if we expect to attain our object; another sufficient reason for requiring that such education should be general among lawyers is that every lawyer ought to be able to pass intelligent judgment upon proposed legislation, constitutional or statutory, and give to his fellow citizens the benefit of his thought on the subject. His thought will be of little benefit if he has made no study of economic or social questions either as a student or in the course of his profession as lawyer. But there are other and stronger reasons why every lawyer, whether he ever becomes a legislator or expects to become one, should study these great subjects. The commercial

tendency of our present civilization and the increasing drift of population cityward have already been noted; the laws of the future must necessarily be largely laws dealing with business or with the relations between man and man in the great city, and many will deal with both. The litigation of the future, I mean the litigation which will be worth the attention of the successful lawyer, will infallibly be litigation involving or arising out of this commercial and social legislation and requiring interpretation and application of its provisions to the affairs of every-day life. How shall such interpretation be intelligently made by a bar and a bench which knows nothing of the great sciences upon whose principles the legislation is supposed to rest? To ask the question seems to be to answer it. Even under very ordinary conditions, where no such great questions arise as those involved in the new legislation of the day, the law cannot be regarded as a separate and distinct science covering a certain limited and well-defined field and no more. It is the science of sciences. It touches life at many angles. Lawyers and judges, even while engaged in mere routine litigation, are daily dealing with practical problems, some commercial and some social in their nature. They need broad and liberal training and the greatest posible breadth of view. If their study is confined to law books alone they necessarily become narrow if not absolutely bigoted. They become the very Bourbons of the profession, neither learning anything nor forgetting anything. If this be true of lawyers and judges who are dealing with small questions and ordinary litigation, how much more must it be true of those who are dealing with the greater and more difficult questions which will arise in construing and applying the new legislation of which I have spoken? And so I reach the conclusion that no lawyer can rightly call himself properly educated for the practice of his profession in the twentieth century unless he has given careful study to economics and sociology. Some of our law schools are recognizing this truth and are introducing courses of this nature, but generally I think such courses are not yet required and often not recommended. Often, as in the case of the evening law schools in the cities, there are no such courses within the reach of the student, but where there is immediate connection with a university containing schools of economics and sociology the student may without great difficulty take his courses in these subjects either before entering on his legal course, or perhaps in connection therewith.

The lawyer who has no such opportunities should not fail to supply the place of academic study by independent reading; indeed

the lawyer who has had the advantage of academic study can not afford to rest content with that. He must by constantly reading keep abreast of the best thought of the day as well in these sciences as in the science of law itself.

If I were to be asked whether any considerable number of the American bar today do this I should be compelled to answer in the negative, and this results I think from the fact that very few American lawyers have ever regarded the law as a philosophy, but rather as a set of rules which are more or less logical in their character, but which whether logical or not have existed so long that it would be profanation to question their merit. This is perhaps the natural attitude of a bar which has been trained to search for and follow precedent.

It is entirely correct to say that the following of established precedent has been one of the distinctive marks of both English and American legal systems. Not that the idea has been entirely absent from other legal systems, but simply that it has not acquired that preponderant influence in them which it has acquired in the Anglo-Saxon systems. There are some advantages from the systematic following of precedent which are plain and undeniable. It strongly tends towards stability and certainty in the law and these are qualities the desirability of which can hardly be overestimated. It enables a lawyer to advise his client with some degree of certainty and thus enables the client to shape his conduct with confidence that the decisions of the past will be followed in the future. Upon many questions it is more important that the law be definitely settled in *some* way than it is that it be settled in *any particular* way. But valuable as is the effect of the systematic following of precedent in this respect, it must still be admitted that there are disadvantageous effects flowing from it which ought not to be minimized or forgotten. Chief among these defects is doubtless the inevitable tendency to obey the dictates of precedent implicitly at the expense of our reasoning powers.

In the legal systems of continental Europe there has been far less of homage to precedent and far more of serious attempt to make the law a philosophy rather than a collection of crystallized rules. Students of law on the continent are required to make long and careful study of works devoted to the philosophy of the law, the springs of human action and the theories of human responsibility as well as of treatises on concrete legal principles and instruction in the actual practice. There has been little inclination among English or American lawyers to follow the continental idea in this regard.

It is certainly time that American lawyers became philosophers. Precedent does not and cannot solve the many new questions which are daily arising under the rapidly changing conditions of modern civilization. European philosophers and philosopher-lawyers have made notable attempts to solve some of these problems and to investigate the springs of human action, and the American lawyer who is seeking for philosophic answers to the problems of the day can hardly afford to ignore their labors. Until recently good translations of the works of continental jurists have not been in existence, but this want has now been supplied, and excellent English versions of the most valuable of these works can now be had. Every American lawyer should make himself acquainted with them, not because they will win cases, but because they will stimulate and broaden his mental powers and make him not a mere follower of precedents, but one who brings a philosophical mind to bear upon every new question.

The propositions which I have been endeavoring to make plain may be thus recapitulated; the industrial revolution has made an enormous change in economic and social conditions in America; it has greatly emphasized the inequalities of opportunity and ability which exist even under simple conditions of life, and made it practically impossible for any government in the future to be conducted on the principle that all citizens are equally able to make their way and defend their rights, and hence, that there should be as little governmental interference as possible; it has made it clear that the great thing which the democracy of the future must recognize is the absolute inequality existing between citizens so far as their opportunities and their individual powers are concerned, and that it must devote its energy towards correcting those inequalities by legislative action; that if lawyers are to maintain their prestige as leaders in governmental affairs, whether as legislators, lawyers, or judges, they must make themselves acquainted with economics and sociology, for these are the two great sciences which must play leading parts in the legislation which has already come and is yet to come in greater volume; that the lawyer of the future must be not merely a high-minded lawyer as we have known him in the past, but a learned man, a philosopher-lawyer, whose outlook has been broadened by study of other legal systems and who has an open mind when considering the new questions which are daily arising and which must continue to arise as the column of the world's progress goes sweeping on to the ultimate and majestic goal of human achievement.

PART V

LEGISLATION

PROLEGOMENA TO A SCIENCE OF LEGISLATION

By Ernst Freund[1]

I

Legislative versus Judicial Formulation of Principles

The objections to the recognition of a science of legislation as an independent branch of jurisprudence, a legislative in contrast to a judicial jurisprudence, reduce themselves to three heads: First, that the problems of legislation can be dealt with profitably only as relating to particular subjects, such as property, commercial law, crime, procedure, labor, municipal government, and so forth; that the situation is the same as that presented by the study of the common law, where we likewise deal with particular topics of more or less limited scope, and look askance at a separate abstract science of law in general, which has no place in the curricula of American law schools; second, that any science of legislation, whether divided into special topics or not, is nothing but an application of that science of law which is well established in doctrine and practice; that there are no principles governing legislation on contracts, wills, common carriers or labor, outside of the recognized principles of the law of contracts, wills, carriers, master and servant, and so forth; third, that in so far as established legal doctrine fails to furnish directions for the framing of legislation, legislation is an art and not a science, a matter of wise discretion in adapting means to ends, similar in this respect to the drawing of a will or contract.

These objections are weighty and valuable because they indicate limitations that must not be disregarded; but they state partial truths only, and ignore vital aspects of legislation.

1. [Born at New York, Jan. 30, 1864; attended universities of Berlin and Heidelberg (J. U. D., 1884); later attended Columbia University Law School and the School of Political Science (Ph. D., 1897); acting professor of Administrative Law at Columbia University, 1892-93; instructor, assistant professor, and associate professor (1894-1902), and since 1902 professor of Jurisprudence and Public Law at the University of Chicago. He is Illinois Commissioner of Uniform State Laws. His leading works are "Legal Nature of Corporations," 1897; "Police Power," 1904; "Oeffentliches Recht der vereinigten Staaten," 1911, and "Standards of American Legislation," 1917.—Ed.]

True, it would be quite unwise to claim for the province of a science of legislation problems, however important, that are peculiar to one subject and have no bearing upon any other; if such problems are touched upon, it is because they illustrate legislative methods in general. The material for a science of legislation is found in statutes on many particular subjects; knowledge becomes scientific when facts are studied with a view to discovering relevant relations applicable to cognate facts and helpful in dealing with them; so we treat statutory provisions in any particular field of legislation as types to serve in the construction of new legislation in some other field. Moreover, there are matters and points of constant recurrence in all legislation, relating to terminology, form, sanction, administration and operation, which may well be segregated, just as we segregate in criminal law or contracts a general part from the specific crimes or specific contracts, as we recognize the conflict of laws as a legitimate branch of the common law, and as we generalize problems of interpretation from other problems that arise in the judicial treatment of statute law.

True, also, that the first requirement for correct and intelligent legislation is a knowledge of the existing law. This may furnish all the data needed for the framing of a statute; thus the draftsman of a negotiable instruments law is well equipped if he is thoroughly familiar with the law of bills and notes. I shall have something more to say upon this point presently. But a knowledge of the law of real property or of the law of landlord and tenant is not enough for the preparation of a good housing statute. The more there is of conventional regulation in a statute, the less help is derived from the common law. Nor will the gap be filled by constitutional law, the knowledge of which will be to the legislator what the knowledge of the housing statute is to the architect.

And true, finally, that a good deal of the task of the legislator that is not controlled or directed by rules of the established law, is outside of jurisprudence altogether, either belonging to other sciences (economics, hygiene, architecture, and so forth), or being matter of sound discretion. As it takes a knowledge of the conditions of a particular case and the exercise of judgment on the basis of it, to draw a good will or contract, so it is with the drawing of a statute: there is an element that is irreducible to rule. But just as it is possible to lay down principles that will best meet typical conditions arising in connection with contracts or wills, so, and in a very much larger degree, is it possible to reduce in legislation

the province of discretion in favor of the province of norm and rule; for legislation should as far as possible deal with like cases in like manner. It is in the recognition and development of this truth that a science of legislation will find its justification.

It is well, also, to recognize at the outset that there are phases of legislation in which the problems offered are of the same character as those which confront the judge in dealing with a common law problem, the difference between the legislative and judicial attitude being the larger freedom enjoyed by the legislator, while the judge is bound by established law. This similarity is evidenced by the fact that a problem which is not fully dealt with by the legislator may become a problem of constructive interpretation for the courts. Thus a statute giving a cause of action to a parent of a child which is killed by the negligence of another, may say nothing as to contributory negligence of the parent; the task of completing the statute in that respect devolves on the court, and the judge proceeds to consider the problem as the legislator would or should have considered it.

What is done in such a case by the legislator is analogous to what is done in the development of common law rules by the process of judicial legislation with which every student of the history of English or American law is familiar. In other words, where legislation requires only the logical or rational working out of some basic proposition, it offers no specifically new methods of legal science. Much, perhaps most, of the legislation in the domain of private law is of that character. Nor is it a controlling difference in legislation of this character whether it is content to express common law principles with such minor modifications as recognized defects of established rules render desirable, or whether it undertakes a radical scheme of reform. Thus the married women's acts of the nineteenth century called for constructive legal thought of a high order, but not for thought for which the traditional learning of lawyers ought not to have afforded ample training. These acts indeed were in many respects based on doctrines which had already been developed through the judicial machinery of courts of equity. The controlling point in determining the character of legislation in this respect is whether or not it can accomplish its end by laying down propositions which are in the nature of principles. If it can, it does not call into play methods of legal thought or reasoning essentially different from those which courts have always employed in building up the law.

But while the methods of legal science employed in the legislative and the judicial formulation of principles are the same, the processes of statutory legislation involve two distinctive problems which in the process of judicial legislation do not exist or settle themselves.

The one is the problem of codification: how far shall the legislature go in the formulation of rules, and what had better be left to unexpressed reason and logic? We have to recognize this as a specific problem of legislation, though rather of the art than of the science of legislation. It is interesting in this respect to compare the French, German, and Swiss Civil Codes, or the chapters in the Field codes on sales or on partnership with the more recent codifications of the same subjects by the National Conference of Commissioners on Uniform State Laws;[2] but while many valuable suggestions may be drawn from such comparisons, they are hardly of the nature of principles definite enough to serve as instructions for draftsmen. It is obvious that nothing analogous to this problem of codification can arise in the judicial development of the law, in which the scope and intensity of rules is entirely controlled by the exigencies of the particular case before the court.

The other special problem of the legislative as distinguished from the judicial formulation of principles has to do with the manner in which a legislature, and particularly an American legislature, does its work. To take again the married women's acts as examples of legislation establishing principles rather than conventional regulations, in important respects these acts are fragmentary, and the present law of husband and wife less consistent than the common law. If a well rounded out and harmonious system of marital property rights was not constructed either in England or in America, this was due in part to an ingrained spirit of legal conservatism that prefers inconsistency to innovation, and partly to a lack of habit of systematic legislative action. Judge-made law has this great advantage over legislative law that the common law claims to be a logically coherent system; a rule of the common law that is not in keeping with all other rules thereby stands condemned as theoretically unsound, and consistency is, therefore, an acknowledged ruling factor in judicial reasoning. Piecemeal legislation, on the other hand, acknowledges no absolute obligation to be consistent in spirit and principle with other legislation; it is sufficient if its operation

2. See an instructive discussion by *Lauris Vold* in California Law Review, V, 400, 471; VI, 37.

does not produce actual inconsistencies in resulting rights and liabilities. Contradictory provisions must be avoided, but not provisions that are merely anomalous or inharmonious; and still less is it an indispensable requirement that anomaly or even injustice do not result from the failure of statutory provisions to harmonize with rules of the common law that are left untouched, or with matters left to implication or remaining unregulated.

It requires a habit of systematic legislative thought to produce a statute, not merely harmonious in itself, but sufficiently comprehensive to prevent anomalies resulting from partial regulation, or—a still higher ideal—a statute harmonious with other statutes of independent operation. Such habit cannot be expected of the lawyer, however eminent or learned, who upon occasion takes charge of a particular piece of legislation, and who will be justified in feeling that he has only a limited mandate with a correspondingly limited responsibility. In my treatise on "Standards of American Legislation" I have urged due attention to correlation and standardization as essential principles of legislation. In a sense both are either matter of course or counsels of perfection, but they assume a very practical aspect if understood as principles necessarily involved in adequate and appropriate legislative organization, and almost unattainable without it. Both English and American legislation illustrate the inevitable shortcomings of measures prepared by distinguished lawyers or judges who are untrained in the practice of systematic legislation. In England, particularly, laws sponsored or inspired by high legal authorities have sometimes exhibited the grossest shortcomings; witness, e. g., the Prescription Act, the Infants' Relief Act, the Illusory Appointment Act, which should be compared with the more comprehensive and systematic property statutes that were evidently prepared by draftsmen or by conveyancers. It is almost inconceivable that measures so open to criticism as those named should be produced by men professionally charged with the preparation of statutes; not that these men are abler lawyers, but that they will take a broader view of their task and by mere force of professional habit will tend to develop uniform and consistent standards. In no other way can such standards be secured, certainly not by the mere observation of precedents which lead to mechanical uniformity and often perpetuate defects and mistakes that might have been avoided by independent drafting.

To sum up these observations concerning legislation that accomplishes its purpose by the formulation of principles: the con-

structive jurisprudence which such legislation calls for is the constructive jurisprudence familiar to the common law; but this jurisprudence has to contend against the effects of haphazard legislative methods, and the problem of legislative science is thus turned into a problem of the machinery and organization of legislative action. The importance of this problem is evidenced by the attention it has received in recent years; when we consider improvements in drafting statutes we think first of all of the organization of legislative reference and drafting bureaus and the professionalizing of the draftsman's work, and this might perhaps be sufficient if the task of legislation were mainly of the type represented by the attempts to codify certain branches of the judge-made law. But we know that this constitutes but a minor part of the legislative output of a modern state.

II

The Specific Province of Legislation

Leaving then aside the formulation of principles in statutory form, a science of legislation as a distinctive branch of jurisprudence is concerned mainly with tasks for which the upbuilding of the common law furnishes no precedents or standards; with those aspects of statutes, in other words, that find no analogy in principles developed by judicial reasoning. *The special province of the science of legislation must be to carry the development of the law beyond what the processes of the unwritten law can possibly do for it.*

Judicial reasoning is by its very nature incapable of producing many rules which may be the only or the most adequate rules for dealing with a legal situation. The instrument of reasoning is logic, and its product a principle. If a principle were always sufficient for the practical adjustment of affairs, we might rest content with the processes of judge-made law, but a mere principle often fails to furnish the needed direction. Principle can determine that a female employe shall not be overworked, it cannot say, ten hours, not eleven. *Reasoning from principle does not produce measured quantities;* the period of the rule against perpetuities and the period of prescription, which seem anomalous exceptions, followed the analogy of previously established periods. The former was taken from the age of minority which was fixed by custom and not by reason, just as it was a custom—the custom of merchants—which

introduced the definite number of days of grace in the law of commercial paper. *Nor can principle produce form;* where the common law requires form for acts, they are due to custom, as the feoffment and livery of seisin, or the seal as a requisite of deed; neither writing nor attestation is anywhere in private law a judge-created requirement. And equity never solved the problem of priorities between successive purchasers or mortgagees, because the only effective means of publicity, the public record of instruments, was entirely incapable of being established or required by the exercise of judicial power.

Measured quantity, conventional form, administrative arrangements, and (it should be added), compromise and concession, constitute the exclusive province of statute law, and if these matters are amenable to principle, it must be principle quite different in kind from that represented by common law rules. The legislator has always the choice between a number of valid rules, and if this choice is controllable by considerations that may aspire to the dignity of principles, the principle is that of constant relations, the relation between methods and results, the law to which human action is subject irrespective of human authority, and largely dependent upon empirical, psychological, and sociological factors. Such a law the lawyer regards as being on the whole beyond his science, and as characteristic of the social and political sciences, and he will look with skepticism upon a proposed extension of jurisprudence in that direction.

In mapping out the province of legislative jurisprudence, it is indeed necessary, first of all, to mark it off from other well-established sciences, bearing in mind that any demarcation of this kind must be more or less conventional, a working arrangement rather than a logical differentiation.

Economics, sociology, and political science differ from other "humanities" by operating to a very great extent with and through legislation. The economics of labor or of transportation not only does not stop at the point of legislation, but in important respects finds in legislation alone its full fruition. Obviously the economics of labor and of railway legislation belongs to political economy and not to jurisprudence. In other fields the boundary line is less clearly drawn. Thus teachers of criminal law, professed jurists, have, in other countries more than in this, taken an active part in dealing with problems of crime, and jurisprudence is not as clearly separated from criminology as it is from political economy. Bar

associations concern themselves with questions of copyright, or of marriage and divorce; to what extent can they, by virtue of being composed of lawyers, on the ground of special studies, and apart from merely human or general experience gathered in the course of professional practice, claim to be experts in these subjects?

The only satisfactory division line will be that which assigns to jurisprudence the collection, systematization, and fructification of those data affecting the choice between various possible legislative provisions which have a specific relation to law as a social phenomenon, and for the handling and understanding of which training and tradition render the lawyer specially competent. Putting it in other words, the norms of jurisprudence are those that look to the adjustment of a new policy to adverse claims, that concern definition, form, proof, sanction, official acts, a due regard for existing rights, for orderly procedure, and for the co-ordination of the new and the old law, the limitations and effects of administrative and judicial processes operating through compulsion, and the attitude of the mind toward the abstract formulation of principles.

Apply this criterion to any branch of legislation: concede the general policy of labor laws to economics; jurisprudence will have to determine the province of statute law and of administrative regulation, the definition of offenses, the incidence of duties, the measure of penalties, the available and suitable methods of control, the correlation of rights and obligations, appropriate remedies, and the limits of enforceability. Upon the issue of strict versus liberal divorce policies, legal science may have no authoritative voice; but it must pass on definitions, defenses, extra-territorial aspects, the effect of divorce upon parental rights, marital property rights, name, testamentary provisions, and alimony. Upon the desirable extent of copyright, literary men or artists may have better information than lawyers, but the opinion of lawyers will be controlling when it is a question of formal conditions which accompany the creation of the right, and of the effect of the non-observance of those conditions upon the protection of the author.

Such demarcation lines cannot be absolutely fixed, and it may be that the progress of other sciences will narrow the bounds of jurisprudence. So long as the problem of justice has no data available other than administrative or judicial experiences, the material can best be handled by the jurist; so in the entire domain of value, damages and compensation. It is, however, quite possible that accurate knowledge will displace empirical judgment in the estima-

tion of some values, whether through actuarial methods or statistical investigations or otherwise. If so, the expert who calculates values will not be a lawyer; jurisprudence will take its data from the non-legal expert, and while the science of legislation will gain, it will not be through an advance in its specifically juristic aspects.

If Anglo-American jurisprudence has no place for problems that are specifically legislative, the neglect can be explained in a very simple manner. For obvious practical reasons, legal writing both in England and America has ever been entirely subservient to the needs of the legal profession. The business of the legal profession is litigation and not legislation. Consequently a question that cannot become the subject of discussion in a court of justice is, generally speaking, a question non-existent for legal writers. The exceptions are negligible. As has been pointed out, the problems that belong to specifically legislative jurisprudence are beyond judicial solution, and most of them are outside of the range of judicial thought. And this has been a sufficient reason for our legal science to pass them by without attention.

And it is not only that the call for professional legal thought in the service of legislation is relatively rare and intermittent, but when called for, it does not leave the same record of its operation as it does in litigation. The words of the statute are too often the only evidence of the legal thought that has gone into it. It is as though judicial reasoning had to be gathered from reports giving decrees only, without opinions, as was the earlier practice of the House of Lords. Moreover, the habit of not supporting decisions by reasons inevitably reacts upon the quality of the decisions. Compare the elaboration of any legal concept depending on facts, such as undue influence in wills, where the question of fact is passed upon by juries, with the same question where it is decided in reasoned judicial opinions, or the problem of administrative discretion exercised by a licensing board that simply states conclusions, with the same discretion exercised or controlled by a court that files decisions accompanied by reasons. Without a discursive statement of arguments in support of action, it is not only difficult to find the standards by which that action was guided, but there is considerable likelihood of the action not having been subjected to the searching test of principle. Had statutes always been accompanied by justifying statements, still more if these statements had had to dispose of contentious arguments presenting the two sides of a question, the study of principles of legislation would have an unquestioned

status. The rule in English and American legislation has been to state no reasons at all, and in the few cases where reasons have been published they have been of the most meager description. The scarcity of the material cannot fail to exercise a discouraging influence, and the student of legislative history will be under constant temptation to turn from the genesis of a statute on which he will frequently find no tangible or convincing evidence, to its judicial interpretation in the study of which he will find ample occasion to deal critically with theories authoritatively set forth. It is only upon the basis of paying material that a science can be expected to flourish.

Moreover, as already intimated, principles of legislation, where legislation goes beyond the formulation of "written reason," are different in kind from common law principles. Forecasting results, they are at most strong probabilities, depending for their strength upon the completeness of the survey of relevant factors and the correctness of the estimate of their operation. There are important problems with regard to which it is wisest to abstain from final conclusions, and to rest content with the recognition of relevant factors and with practical decisions. So with regard to the important question of form or informality of contracts. The arguments on either side are fully stated in the Commissioners' notes to the German Civil Code,[3] and with these arguments the student of legislation should be familiar. But it does not follow that the conclusions of the commissioners should be accepted as determining the issue, and they are far from making such a claim. They decided in favor of informality for some of the most important contracts for which the Statute of Frauds fastened upon our law the principle of form. In fairness, this should be treated as an open legislative question. But assuming that the decision is made in favor of form, experience shows that there are rules that should govern the choice and detail of form and which cannot be ignored without causing inconvenience. In this more modest field, conclusions may be formed and stated, and an examination of statutes and of their judicial operation with this end in view is an undertaking as legitimate as any within the range of the political or social sciences. In a survey of the problems of legislative jurisprudence the difference between the understanding of relevant considerations and the possibility of reaching some determination with regard to their relative merits should be constantly borne in mind.

3. Volume I, pp. 179, 180.

III

Forms, Terms, and Remedial Provisions

This matter of choice of forms may well illustrate the nature of legislative jurisprudence in one of its main departments.

Suppose the legislature decides in favor of requiring a formal act, what rules can be laid down for its guidance? What can we learn from the judicial history of the Statute of Frauds? The provision that the attestation of a will must be made by the witnesses *in the presence of the testator* has caused a great deal of litigation and judicial controversy. Why was it ever introduced? An early case says the object was to prevent the surreptitious substitution of another paper for the genuine will.[4] The explanation—and no other has ever been suggested—is too absurd to deserve notice, except that it illustrates the kind of thought that is given to the genetic history of statutes. If there is no better explanation, we have a troublesome requirement serving no good purpose. Yet the provision has been copied into every American wills act, and has been amplified both in England and in some American states—a striking illustration of the aimlessness of statutory detail. Two principles are violated: first, that no formality should be required that serves no distinct and valuable object, particularly not where the formality is to be complied with by private persons; second, that under no circumstances, unless absolutely unavoidable (of course attestation is impossible unless the signature is made or acknowledged *in the presence of the witnesses,* otherwise it would be an untrue record, and this requirement creates no difficulty), should requirements that are matter of record be mingled with requirements that must rest on oral proof. If such a requirement as physical presence is contained in the formalities prescribed for a notarial will, it is a different matter, because the notarial certificate is in itself matter of record and is practically unimpeachable; this is proved by the practice under the German law, and by the former formalities of married women's acknowledgments of deeds, the notarial certificate being always accepted at face value.

If proof is demanded for the proposition that it is contrary to sound principle to mix matter of record and matter of oral proof (matter "in pais"), reference should be had to the cognate practice

4. "To prevent obtruding another will in place of the true one": *Shires v. Glascock,* 2 Salk. 688 (a decision rendered ten years after the enactment of the Statute of Frauds).

of permitting matter of record to be affected or impaired by facts resting on parol proof; this is much more difficult to avoid, because to exclude oral proof matter may amount to shutting out important equities except on condition of their being reduced to matter of record. The point is illustrated by the effect allowed to notice as against a record under the conveyancing acts, an unfortunate impairment of the integrity of record titles first introduced by courts of equity, then adopted by legislation and perpetuated to the present day, but the unsoundness of which is demonstrated by the more recent and more carefully considered course of legislation in England, and by its total abandonment in the new legislation for the registration of land titles.

As pointed out, the avoidance of needless formality should be insisted upon particularly where the act is one to be performed by private parties; if performed or supervised by officials, not only will any defect be apt to be covered by a correct (because stereotyped) form of certificate, but a defect is much less likely to happen because it may be expected that the official will act both with greater knowledge of the law, and with greater sense of responsibility.

This difference between official and private action is of controlling importance in the whole matter of statutory terminology, which constitutes one of the other main departments of legislative jurisprudence.

Much in the matter of adequacy and definiteness of terms is simply a question of good English and of a thorough understanding of the subject legislated on; but while good English is not beyond the range of possibility in the drafting of statutes, legislation cannot always wait for perfect knowledge, and therefore cannot always avoid terms involving either questions of degree or an appeal to judgment; moreover indefiniteness may be deliberately preferred to definiteness as a matter of legislative expediency or tactics. The availability of indefinite or elastic terms is a matter with regard to which a study of statutes and their operation will be found to yield valuable principles of legislation.

The decisive consideration is furnished by the conditions under which the law is to be applied and the kind of persons or bodies to whom it is addressed. A careful working out of relevant distinctions would throw much light upon the failure and success of legislation. We should understand how it is that penal statutes couched in vague and elastic terms are not only obnoxious to justice, but prove in practice unenforceable; we should learn on the other hand

that the most general language may be the most desirable in the grant of beneficial powers, while considerations of a special kind apply in using indefinite terms as a basis of civil liability and in matters affecting the security of titles. All these points can be illustrated and proved by the history of English and American legislation. The lessons to be drawn from that history have by no means all been learned, and their neglect accounts for some of the most conspicuous failures of legislative experiments.

The controlling difference between a penal statute and a grant of power is that in the former an error of judgment in the interpretation of the elastic term involves the risk of fine and imprisonment; in the latter merely the nullity of a declaratory act. For instance: "A factory shall be equipped with adequate exits"; in the absence of further definition this provision cannot easily be made the basis of a penalty; otherwise, where the law provides for appropriate administrative action defining adequate exits and imposes penalties only where the duty has thus been made definite; in the latter case a specification must precede a violation; the owner of the factory has the choice between obeying or treating the administrative act as invalid; the latter is a gambling chance which is properly at his risk; for the presumption is in favor of the validity of the specific administrative act, and if the law is well framed the order will be appealable.

The nullity of a simply declaratory or executory act—whether official or private—may disappoint expectations, but does not throw established de facto relations into confusion as is the case where executed acts are stricken by nullity. Practically every system of law tends strongly to attach to non-compliance with its rules the effect of nullity, partly because nullity operates as it were automatically, requiring no active initiative, but merely passive defense, partly because it appears as the simplest logical consequence of non-compliance. A legal act (i. e., an act done for the purpose, and intended by law for the purpose, of producing a legal effect) requires a prescribed form, or is not to be done except where prescribed conditions or qualifications exist, or is altogether prohibited to certain persons, at certain times, or for certain purposes; the act is done without that form, in the absence of the prescribed condition or qualification or in defiance of the prohibition; since for its effect it depends upon the law, is it not natural and logical to deny it the intended effect? Such reasoning seems plausible, if not irresistible.

But consider the situation where the act done in contravention

to legal requirements or prohibitions is not purely executory, but has altered actual relations of possession or status. To deny all legal effect to de facto conditions having the outward semblance of legality means confusion, insecurity, breach of faith, injustice. It is sufficient to think of a void marriage. On the one hand the need for law enforcement and the logic of the rule, on the other the claim that an established fact has to recognition—where is the solution?

The continental common law has a rule in favor of possessory conditions which has been incorporated into the French and German codes. The French code expresses it: "In the matter of movables possession counts as title." The common law of England has no similar general rule, although the doctrine of estoppel operates in some respects to the same effect. In the matter of marriages the canon law tempered the operation of its impediments by establishing a rule of voidability instead of nullity, in opposition to the nullifying effect of common law impediments, which the legislature extended to the most important of canon law impediments, that of relationship. Parliament was for a time even willing to visit the failure to obtain parental consent with nullity, but this was subsequently abandoned.

Both the common law and English legislation thus evince a tendency to apply the rule of nullity very rigorously. The judicial tendency is capable of explanation, for the rule of nullity comes naturally by logical deduction, and to counteract it requires concession, compromise and the creation of qualified, conditional, or limited rights—the very things judicial reasoning is incapable of producing, the very things which belong to the peculiar province of legislation.

Here indeed we encounter one of the most valuable functions of legislation, a function of stabilization, to reconcile as far as possible the claims of de facto relations with the claims of the original statutory policy which through inadvertence or otherwise has in some respects met with failure. The zeal which animates the legislature in pursuit of a policy leads it now and then to press the rule of nullity even beyond what the courts believe the logic of the law demands; compare, for instance, the statutory provisions concerning the invalidity of sales made by concerns engaged in unlawful trusts with the doctrine of the United States Supreme Court upholding the validity of such sales;[5] and generally speaking, there seems to be no clear realization that here is a special function which legislation has to perform.

5. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

I should consider it as one of the important objects of a science of legislation to study and define the legitimate place of what may be designated as remedial and validating provisions. The material is found particularly in marriage legislation, in conveyancing statutes, and in the history of the law of testaments and wills. The validating function of legislation expresses itself in provisions which declare that non-compliance with specified requirements shall entail only a penalty, or shall warrant an application for preventive or other equitable or compensatory relief, but shall not cause collaterally available nullity; or in provisions that save certain aspects or parts of the defective act (issue of void marriage legitimate; attestation of will by interested witness to avoid only his interest and not the entire will); or in provisions that permit doubtful matter to be passed upon at an early stage by appropriate authority and to be concluded by its determination. Compare the canon law doctrine of devolution of a decedent's personal property with the common law doctrine of descent and devise, and the indisputable advantage for the facility of transfers resulting from the official authority of the executor or administrator; note the possibility of settling at once every question that may arise as to testamentary capacity and form and genuineness of will, by a proceeding for solemn probate, the gradual displacement of the common form of probate by this more conclusive proceeding, and the general extension of probate to wills of real estate which, under the common law practice, could be attacked for alleged defects of form or capacity during the entire period of the statute of limitations—and the soundness of the principle of legislation represented by the law of probate, as well as its expansive force, will be realized. The ecclesiastical courts were not, or only slightly, affected by the common law aversion to admitting official intervention in private affairs, an aversion also much less entertained in America than it was formerly in England (England is rapidly changing in this respect), and they thus succeeded in developing practices which experience proved to be superior to those of the common law, and which could be given full effect only by legislation.

In the law of conveyancing, legislation was called for to establish adequate publicity by an official recording system, while the validating effect of official action is only slowly and cautiously admitted in the so-called Torrens system of land title registration. Whether such effect can be given through administrative or only through judicial action is still controverted; and the general feel-

ing is probably that in private law administrative action is better suited to the application of precautionary checks (as in the matter of marriage licenses) than for conclusive determinations. Where it is not a question of adjudicating between conflicting private claims, but of determining matters fit for administrative disposition, statutory expedients for creating official powers of speedy and conclusive determination encounter less difficulty and are resorted to with increasing frequency. A very slight change of phraseology may turn a jurisdictional prerequisite into a matter submitted to jurisdiction (power to act in an emergency as against power to act when an emergency is believed to exist). The same difference is of importance in the framing of statutes for special judicial proceedings for the establishment or liquidation of important legal relations (adoption, sale of infants' estates, insolvency, drainage or irrigation). There is the double problem of securing compliance with substantive and procedural requirements, and of setting controversial questions at rest; a problem that cannot be solved without carefully elaborated contrivances in the way of required statements, notices, inquiries and findings, rights of appeal, and provisions in the nature of short statutes of limitations, but which can be solved for a considerable variety of statutory proceedings on principles that are similar or substantially alike.

Terms, forms, and remedial provisions present problems of constant recurrence in legislation, and which would, therefore, hold a prominent place in a system of legislative jurisprudence. The problems are of such nature that they can be effectually solved only by appropriate statutory provisions; no common law principle either of administrative law or of statutory construction can do more than furnish partial and inadequate, if any, remedies for doubts or inconveniences that are occasioned by the failure to make such provision, or that attend faulty legislation. The rule to be observed by the legislator is a rule of demonstrated fitness in adapting means to ends, a rule utilizing, by expedients of either language or procedure, the lessons that judicial and administrative experience has drawn from legal and legislative history, a law of legislation. Surely the formulation and application of such rules is a legitimate function of jurisprudence.

Terms, forms, and remedial provisions are matter of technical detail which arouse slight popular interest, and with regard to which the legislator may be expected to have an open mind. Barring the cases in which the desire to press home some strongly enter-

tained convictions concerning policies leads to an insistence upon drastic sanctions in the way of penalties, forfeitures, or nullities, the legislator will be inclined to accept what he has reason to believe the best thought on the subject, and the recommendations of draftsmen enjoying the confidence of the legislature will carry much weight. Not only, therefore, is this field one that lends itself especially to systematization, but a system recognized as wise may have a reasonable chance of making an impression upon actual legislation. Conversely, for the building up of this phase of legislative jurisprudence there is the same need as there is for the securing of high standards in codifying or reforming common law principles, the need of an appropriate organization of the business of legislation. The best principles of legislation cannot be expected to be constantly in the minds of those who are charged with the task of securing the adoption of a controverted policy. Not only that, but the draftsman's standards are always liable to be disturbed and impaired by the freedom of parliamentary amendment. This is one of the inevitable effects of popular law-making upon scientific standards of legislation. Parliamentary interference will be a disturbing factor in proportion as a measure engages public attention and interest. Standards of legislation will, therefore, gain in proportion as it will be possible to arrange and systematize legislation in such a manner as to segregate justice from policy. Such segregation may be accomplished in part by rules of procedure, in part by the separate codification of technical provisions that will serve for a number of statutes alike, after the manner of codes of procedure and of interpretation acts. The cause of legislative jurisprudence is bound up with what Sir Courtenay Ilbert has called the mechanics of law making.

IV

Policy, Discretion, and Methods of Control

When we approach the domain of policy in legislation, the predication of any principles that can claim to be called scientific becomes increasingly difficult. We must be on our guard against mistaking personal preference for inherent superiority or a prevailing tendency for a permanent law. The temptation of claiming for jurisprudence too much is especially strong in view of our American doctrines of constitutional law. Important policies have been written into the bills of rights and have thus become binding

rules of legislation, whose interpretation and development is a legitimate function of judicial jurisprudence. This is, for example, true of the freedom of speech and press. This freedom, by virtue of being proclaimed in the constitutions, becomes a principle of American legislation, a principle in the sense in which the underlying policy of any statute becomes pro hac vice a principle, but it does not follow that freedom of the public expression of thought is a principle of legislation in the sense in which the liberty of private conduct is. The latter is an unescapable limitation upon legislative power to which it must conform by the conditions of its operation. It would be impossible, for the present at least, to make a similar claim for the freedom of speech and press.

Passing from specifically recognized policies to the general guaranties which we associate with due process and the Fourteenth Amendment, there may be an even greater inclination to identify these with scientific principles of legislation. But even here the identification must be rejected. For either the due process clause is used to support economic liberty, in which case it likewise stands simply for a fundamental policy, and one so much controverted and attacked that the historic law of legislation seems rather to run counter to the constitutional doctrines of American courts[6] or due process furnishes the ground from which to attack unreasonable legislation. Now if the idea of reasonableness were given a sufficiently definite content, it might well stand for a science of legislation. But under the limitations of a purely negative judicial control this aspect of constitutional law reduces itself to the question: What is the worst that the legislature can do without violating the Fourteenth Amendment? It is obvious that on this basis the amount of constructive principle that constitutional law will furnish to legislative jurisprudence will be meager indeed.

It would on the other hand not do to expect of a science of legislation in every case an answer to the question: What is the best that can be done through legislation? And if that question could be answered, it would not follow that the legislature in every case would or should do it. There must not only be legislative discretion, but truth and reason are not necessarily its only guides.

Compare in this respect private action, administrative action, and legislative action. According to the theory of our law—different in this respect from the continental European law—adminis-

6. See my "Standards of American Legislation," chapter 1.

trative action is not only bound, but directed by legislation, and the relatively narrow province of administrative discretion indicates the necessary modification of that rule. Private action is bound, but not ordinarily directed, by law, so that there remains a wide domain of freedom which may be subject to other than legal rules (custom, morals, convention), or may be entirely unrestrained. Legislative action is (barring the limitations of a written constitution) legally free, but normally is more bound by rule than private action, for the reason that its object is the production of some rule of action, and a rule of action cannot make an adequate appeal for submission unless it is itself the embodiment of principle, at least so far as principle is capable of being applied. Freedom from principle in legislative action in other words is legitimate only if a principle is not available.

Let us examine the nature of legislative discretion more closely. Take, in the first place, the domain of technical private law in which the legislature competes with the courts for the purpose of codifying, supplementing or reforming the unwritten law. The legislature here professes to be guided by reason, and the discretion which it exercises is in the nature of a sovereign judgment. Legislation of this type is generally amenable to the test of principle, though by that test its shortcomings are often only too obvious. Examine in the light of what might be demanded in the way of a rational and co-ordinated system, such a typical portion of statutory private law as the regulation of marital property rights, and it will readily appear that if to these matters the same quality of systematic juristic thought were applied, as goes into judge-made law, the results would be very different. The principles to be applied are the principles of private law, differentiated according to different subjects, and only to a minor extent principles applicable to legislation as such. And the discretion exercised in not accepting the best principle is to a great extent simply the indisputable prerogative of any one charged with a task requiring skill and knowledge to produce an inferior instead of a superior piece of work.

To a great extent, but not altogether. It will sometimes happen that a statute appears in point of reason inferior to what it might be if constructed along purely rational lines, when we yet are bound to say that a representative legislature could hardly do otherwise than legislate in that particular way. To illustrate: When the married woman was made mistress of her own property, reason would seem to have required her to be placed under legal obligation

to make a contribution out of her property to the support of the family. The French and German law contain provisions to that effect. Even if their attention had been directed to the point, American legislatures would probably have been unwilling to enact similar legislation. The reason for the reluctance is probably not the feeling that the husband should bear the burden alone, but an unwillingness to give the husband a cause of action against his wife for contribution, or a temperamental tendency to let well enough alone, and not to introduce something new for which there is no insistent or articulate demand. It is not that discretion is here entirely devoid of principle, it is rather that the basis of principle is sentiment and not reason, and the student of legislation cannot afford to overlook that phase of it, although "jurisprudence" may be unable to systematize sentiment, elusive, undefinable and "unscientific" as it is. Perhaps we had better assign that side of legislation to political science. We may place in the same category the unwillingness to lower high abstract standards once they have been proclaimed in legislative form, a phenomenon to which I have adverted elsewhere.[7] And for America at least, the persistent and in a sense deliberate, though not avowed or perhaps even fully realized, divergence between legislative and administrative standards, noticeable particularly in divorce legislation, is another factor of some importance that enters into the understanding of legislation.

We can speak here of elements influencing or even controlling legislative discretion, even if we do not care to dignify them by the name of laws or principles.

There are other phases of legislative discretion that elude even that much of rule. Upon such matters as the issue between wet and dry, strict and liberal divorce, permitting or forbidding marriage between different races, it is impossible to dogmatize. Legislative discretion here is that freedom of choice which represents ultimate and in a manner transcendental divergences of point of view and philosophy. At the opposite pole, but equally irreducible to calculation, stands the freedom of choice which means practical indifference, and which determines the alternative between several purely conventional possibilities, as where a period or an amount has to be fixed without any definite basis of relation or computation.

In a sense even such discretion is not arbitrary. The nature of law demands order and method, and therefore, although the

7. "Standards of American Legislation," p. 104.

legislature is free to choose, it does not, because it cannot without violating the superior law of its own being and action, vary its choice suddenly or capriciously from year to year, or from measure to measure, and is guided in its determination by custom, expectation, and the demand for relativity, uniformity, and stability. This is so natural and unquestioned that further comment is unnecessary. Illustrations are furnished by the uniformity of statutes of limitations, of the period of full age, of the amounts of fines, and so forth.

There is another phase of legislative discretion in which constructive juristic thought plays a much more important part. It is that discretion which stands for a policy of justice in matters in which justice must, for lack of accurate data, be more or less a matter of guesswork, where the thing demanded is fairness and equity between conflicting claims. This kind of discretion permeates the exercise of the police power. We recognize the interest of health as a higher interest than the interest of wealth, and the subordination of the latter therefore as legitimate. But such subordination is not always entirely practicable, and the extent to which one interest shall yield to the other presents the most delicate problem of conflicting considerations. This is equally true, if not more so, where one economic interest stands against another, particularly in the fixing of returns for services rendered or value given. *In the absence of objective and scientific criteria, some guaranty of fairness may be found in the choice of methods of control, upon the theory that certain methods by their very nature carry automatic checks, and that in any event there is a reasonably definite relation between forms of control and ends to be accomplished.* The study of these forms thus constitutes an important branch of legislative jurisprudence.

Above all it is necessary to distinguish the direct action of the legislature from its action through delegated powers. So long as there has been theoretical discussion of government there have been attempts to discover the effect of the forms upon the substance of legislation. There was a time when a representative popular assembly was believed to carry the guaranty of its fairness in its representative character and in its responsibility to the people; but while there is again some tendency to contrast in this respect representative action favorably with direct popular action, we have certainly ceased to believe in the adequacy of this guaranty. It is instructive to compare with this decline of faith in legislative methods the

continuing confidence in the constitution of the courts and the forms of judicial action, which are likely to be accepted as adequate guaranties of fairness where the data for formulating specific rules are inadequate. Without disparaging in the least the legislative sense of equity, any attempt to surround legislative action with the same safeguards that have been found indispensable in judicial organization and procedure, would not only fail in view of the constitution of a popular body, but that very constitution seems contrived for the purpose of making occasionally policy triumph over justice.

The inevitable shortcomings of legislative constitution and procedure from the point of view of legislative jurisprudence increase the value in that respect of such checks as may be found in the available methods of legislative control. These are after all limited to a relatively small number of types. There is on the one hand communal action (national, state, or local) which pursues the ends of government by using public resources for aid and service, and is bound by recognized laws of public finance and public administration, and into which enter such well understood branches of jurisprudence as the law of public office, of public property, of public contract, and public liability. There are, on the other hand, the forms of subjecting private property or private action to the law: public exactions (taxation, eminent domain, compulsory services), civil liability, and the control of the exercise of private rights. The problems of legislative jurisprudence are clearly revealed in the treatment of civil liability. We are accustomed to regard the common law as adequately determining the principles of civil liability. The phenomenon of accident as a practically inevitable result of the employment of great mechanical forces not only in industry but in every walk of life, opened the eyes of the community to the inadequacies of the common law, and we are gradually coming to recognize that statutory liability has become a means of shifting and averaging losses, and involves problems of limitation, precaution, supervision, insurance and distribution of relief, of which the common law knows nothing. We may not be prepared to say a given problem can be handled only in one way; but we know now, in the light of even very limited experience, what a given method of handling the problem involves in the way of necessary and available means and consequences. And in this matter we have only the very beginning of a legislative jurisprudence, associated with the advent of workmen's compensation legislation.

Experience in other forms of control is very much more ample.

Legislatures are, in a general way, familiar with the difference between prohibition, restraint, and requirement, between publicity, certification, license, exemption, monopoly, specification, and standardization. Each form by its very nature is subject to limitations which cannot be ignored with impunity, and may require the observance of appropriate conditions to insure its successful operation. Indistinctly this is realized, but the available data have not been collected or systematized. The police power deals with so many different subjects that study has been absorbed by the subject matter to the neglect of the methods of control; or, as in the United States, the study of the methods of control has been devoted to constitutional problems, as in my own treatise on the "Police Power." Thus in Europe the study of trade legislation is regarded as part of the economics of trade, while in America it also includes the study of the limitations of the legislative power over trade or of its distribution between state and nation. Would it not be worth while to study the province of positive requirements as distinguished from the province of restraints, and to examine on the basis of legislative and administrative experience, in what classes of cases positive requirements are appropriate and wise, and in what form and to what extent they can be safely applied? Much more would be learned in this way concerning the central problem of legislation, the adjustment of public control to private liberty, than by the study of a mass of judicial decisions upon the limits of the police power.

Methods of control cannot be considered without taking into account the legitimate function of delegated administrative action. The delegation of legislative powers to be exercised by administrative regulation has been discussed from the point of view of constitutional permissibility, but, owing to the failure to analyze with care the reasons that induce such delegation, with very unsatisfactory results. Where the legislature has, or can easily obtain, the data necessary for the intelligent framing of rules, there is both from the point of view of law and of government a strong presumption in favor of policies being fully set forth in statutes, and delegation should therefore be required to justify itself by strong countervailing considerations of the desirability of a flexible administrative control. But a different situation presents itself where the data for an intelligent framing of rules are not available or where it is desirable to confine interference with private liberty to purely corrective measures. Administrative action lends itself to qualification

by safeguards which are incapable of being applied to direct legislation and which may be instrumental or essential in working out a policy of justice. Delegation of legislative powers is then justified by inherent superiority of method. Through such delegated action alone is it possible to secure the semi-judicial handling of legislative discretion. This is specially true where legislative action aims at the fairest balance of conflicting economic claims. In the absence of known principles for the determination of values and fixing of rates, the next best substitute is the compromise that results from contentious argument. A reasoned decision requires the tentative laying down of something like a principle, and out of a multitude of decisions a permanent principle may ultimately grow.

English legislation entrusted the fixing of rates and rents to commissions having all the organization and powers of courts of justice, binding them substantially only to the rule of fairness. In America the practice has been to give to similar commissions a more administrative character. This would not be a disadvantage if it meant a greater latitude in dealing with precedents. In any event, administrative, like judicial, and in contrast to legislative, action implies more concentrated responsibility, a tendency to professional tradition and habit of action, and the possibility of applying procedural safeguards. Such legislation as the Interstate Commerce Act with its successive amendments illustrates modalities of delegation intended to affect the substance of control. Action upon complaint, action subject to approval, the requirement of hearings, the forms of permissible orders, indicate important differences in the exercise of rate supervising and rate making powers, and in the relation of private liberty to public control. The working out of justice in better ways than the legislature can bring about by its own direct action is the function and justification of delegation in these cases, and this is not disproved by the failure of the process up to the present time to produce satisfactory results. This failure is due in part at least to the insufficient attention that has been given to the modalities of delegation and their effects. If delegation is to make the process of legislation more scientific, the process of delegation must itself be subjected to critical study and analysis.

In compiling my collection of "Cases on Administrative Law" I attempted to include this matter;[8] but the results were unsatisfactory owing to the scarcity of case material. Much more material could,

8. Chapter 1, "Executive, Quasi-Judicial and Quasi-Legislative Functions."

undoubtedly, be gathered at the present time from the decisions of public service and similar administrative commissions; but the analysis of cases can never be as illuminating as a study of administrative experience like that presented by the American Association for Labor Legislation in its pamphlet on Labor Law Administration in New York.[9] A science of legislation will require substantiation through work of that kind.

In studying methods of control we should not overlook interest representation and the popular, neighborhood, or group referendum. Referendum action is essentially irresponsible and unamenable to principle. We recognize this even in the case of the jury which acts under the sanction of an oath and the requirement of unanimity. The possibilites of arbitrariness, where these safeguards are removed, explain the attitude of the Supreme Court in holding that the subjection of rights to uncontrolled majority dispositions may amount to deprivation of due process.[10] Again it belongs to legislative jurisprudence to study the use of the referendum as a method of regulation, and its forms and checks, to distinguish political decisions by the people or by a local community at large from property or business decisions by small groups, to differentiate the overruling of interests by adverse interests from vote requirements so arranged as to bring about compromise or even to require substantial consent, and to study the problem of interest representation and its co-operation with official administrative organization. The legislative material is growing, and valuable experiments are being made in such widely different fields as city planning and minimum wage legislation—legislation which has had the advantage of careful thought and abundant discussion prior to its enactment.

V

Jurisprudence and Political Science

It may be objected that the problems of legislation thus stated are either problems of administrative law or problems of political science. I should answer that after many years of the study of administrative law I began to realize the full significance of this branch of the law only when I approached it from the point of

9. American Labor Legislation Review, Vol. VII, No. 2.

10. *Eubank* v. *Richmond*, 226 U. S. 137; note, however, the modified attitude of the Supreme Court in *Cusack Co.* v. *Chicago*, 242 U. S. 526.

view of constructive problems of legislation. And generally speaking I should be willing to concede or assert that not only the progress of legislation, but the progress of all law, is conditioned to a great extent upon the proper utilization and development of administrative processes, and that this can be demonstrated by a comparison of common law and canon law, of common law and equity, of common law and civil law, and of common law and modern legislation. I should further answer that the most practical aspect of political science is the contribution it can make to the solution of problems of legislation. It is impossible to differentiate very clearly what belongs to political science and what belongs to jurisprudence. Administrative organization may be more appropriately assigned to the former, administrative procedure to the latter. The majority problem has political, legal, and mathematical aspects; where the group referendum is used as a means of reaching fair decisions in property or business regulation, the problem is essentially one of the technique of justice.

Again, consider the problem of areas of legislation, largely determined as between state and nation by national constitutions, as between state and locality by long established custom. So far as the determination of areas is open to the legislator and indeed so far as it is a legitimate subject of theoretical inquiry for the student, though practically settled by written constitutions, the subject is political rather than legal in its nature; but the proper adjustment between the different provinces for the purpose of avoiding conflicts and securing the best co-ordination and co-operation, is a distinctly juristic problem, to be solved by adequate and appropriate formulation and procedure. Compare the abundance of discussion of the spheres of national and state legislation in the United States from the point of view of constitutional law, with the meagerness of the treatment of the same subject in its constructive aspect. Whether political science or jurisprudence, or both or partly one and partly the other, there is urgent need of studying the most effective manner of the local or areal apportionment and interadjustment of legislative powers.

Legislation being government in the form of law, the division of its study between the provinces of political science and jurisprudence is natural. The range and classification of legislative activities, the tendencies underlying the movement of legislation, the processes by which laws are initiated, prepared and carried into and through the legislature, the legislative organization for this

purpose, the organization and the instruments of propaganda, the differences between propaganda and the presentation and substantiation of the "case" for the statute, the motives avowed and unavowed that actuate promoters and legislators, the political constitution of the power that is required to enact the law, the formation of the majority and the checks upon it, the securing of adequate representation of the popular will, the organization and power of minorities, the due consideration of adverse factors, the recognition of the difference between the legislative and the administrative attitude of mind, the power of individual resistance, the just estimate of the unintended reactions both of the normal operation, and of the lawful and illegal evasion, of the law, and the safeguarding of the permanent and higher policies which we associate with the guaranties of bills and rights—all these are matters fully as important as the legal phases of legislation, and have long since been appropriated by the study and science of government. If in America lawyers and courts have undertaken to solve the problem of the adjustment of the higher policy of liberty to the more immediate demands of social control, under the name of constitutional law, they have trespassed upon a province not their own with very indifferent success. It is, however, true that for the study of some of the suggested problems the equipment of the lawyer is needed as much as, if not more than, that of the political scientist; it is simply a question of the preponderance of the legal or of the governmental aspect. On the continent of Europe this close connection between jurisprudence and political science has always been recognized both in university organization and in scientific literature; in England there has been an almost absolute divorce between the two, while in America the willingness and eagerness of political scientists to make jurisprudence an integral part of the study of government has encountered a somewhat cool reception on the part of professional jurists, who believe that legal studies can be successfully pursued without the aid of political science.

If this is true in so far as law is treated purely as a product of the judicial mind—the traditional attitude of the common law—it ceases to be true as soon as it is recognized that the purely judicial view of the law is hopelessly inadequate for any purpose but that of the legal practitioner whose mental vision is centered upon the court-room. *The processes of the court-room alone will not serve in the future (whatever may have been true in the past)*

to give us the needed advances in law; but so long as we may hope to retain the benefits of the traditional spirit of the administration of justice, a knowledge of the processes of the court-room will be essential to the proper understanding and handling of problems of legislation. Legislation from the point of view of law is social control adjusted to the conditions of ultimate judicial enforceability, with all that this implies, and legislation that tries to escape these conditions in reality attempts to establish government without law, government by flexible personal discretion, which in some quarters is honestly believed to constitute for some purposes the wisest legislative policy. The advocates of even such a policy must realize that if they want effectually to dispense with law, they cannot safely dispense with the knowledge drawn from judicial experience, and that the principles of legislative jurisprudence cannot be ignored in carrying out their policies.

The foregoing analysis, if written to any purpose, should have made it clear that, as legislation cannot do without jurisprudence, so jurisprudence cannot do without legislation.

The great difficulty in giving practical effect to this view by making legislative jurisprudence part of the recognized science of law and gaining for it admission to the curriculum of American law schools lies in the fact that the apparatus of legislative jurisprudence is not that to which law teachers are accustomed. While case-law can be used with great advantage in the study of legislation, the principles of legislation can never be learned from an exclusive or intensive study of cases. Judicial jurisprudence operates with reason, which stands for logic and equity, and, with authority; in legislative jurisprudence the place of authority is taken by the empirical teachings of the history of legislation. The danger of the empirical basis must be realized. An unmistakable trend of legislation may be accepted as evidencing a law of legislation; but is this law temporary or is it—from the point of view of reason—permanent, sound or unsound? The ultimate appeal must be to convictions not so firmly grounded as the conclusions of natural science; but so it is with all social sciences and with all judicial law, so far as it represents reason and not simply authority.

But there is this further difference between judicial and legislative jurisprudence: the process of judicial reasoning always leads to a result that at least claims to be entitled to intellectual assent, while the fruit of the study of legislation will for practical purposes often be an appeal to discretion on the ground of expediency.

The utmost that will be contended for in these cases will be the establishment of some tendency, or perhaps only the relevancy of some consideration. We shall have to be satisfied with a correct analysis of legislative phenomena, the operation of which eludes prediction as well as control. The task of legislative jurisprudence will then often narrow down to the reduction of statutory terms and provisions to more general categories available for other legislation.

And here the danger will be encountered of laying undue emphasis upon mere correctness of abstract generalization, a danger that lurks in dogmatic or systematic jurisprudence generally, and to which the science of law in Germany has to a certain extent succumbed. While the standards of German legislation in their technical and juristic aspects are entitled to the highest regard and deserve careful study on the part of every other nation, the inquiry into the nature of juristic concepts ("construction") which characterized the work of the most eminent German jurists during the entire nineteenth century has borne little practical fruit. What is valuable in the analysis of legislative concepts is not the establishment of ultimate logical categories, but the discovery of types that bear a definite relation to practical and vital problems of new legislation. Let it be clearly understood and constantly borne in mind that the improvement of the technique of lawmaking must be the object and the justification of a science of legislation.

PART VI

ANALYTICAL JURISPRUDENCE

LEGAL POSSESSION—TWO MAXIMS

By Henry Goudy[1]

At the last meeting of the International Congress of Historians, held in London in 1913, I read an essay on two ancient brocards or adages familiar to lawyers, viz., "Actio personalis moritur cum persona" and "Cuius est solum eius est usque ad cœlum"—in which I endeavored to trace their origin and significance. The former of them I showed to be of purely English provenance and due to an early misunderstanding or confusion of ideas, especially on the part of Bracton, about Roman law; the latter was traced to the glossarists and, though never actually used by the Roman jurists, was, I submitted, quite in conformity with the Roman law.[2]

Having been honored by the request to write a paper for the collection of academic essays to be presented to Professor Wigmore and being unavoidably prevented from doing so in an elaborate form, I venture to offer as a contribution the following brief notes on two familiar adages relating to legal possession. No one knows better than Professor Wigmore the influence (not always beneficial) of legal maxims upon doctrine, especially in matters of evidence. The creation of "ius ex regula" against which Paulus admonishes,[3] is only too apt to occur.

I

Beati Possidentes[4]

This maxim is nowadays frequently used in a vague sense by lawyers and politicians; it was, I am told, a favorite of Bismarck.

1. [Regius Professor of Civil Law in the University of Oxford; D.C.L.; Hon. Bencher of Gray's Inn; was first president of the Society of Public Teachers of Law in England and Wales; revised and edited the second edition of *Muirhead's* "Historical Introduction to the Private Law of Rome"; translated from the German *Jhering's* "Law in Daily Life," with notes and additions (Oxford, 1904). Among various other writings of the author are "Artificiality in Roman Juristic Classification" in Studi Fadda, 1906, and "Trichotomy in Roman Law" (Oxford, 1910).—Ed.]

2. "Essays in Legal History" (ed. Vinogradoff), Oxford, 1913, pp. 215, 232.

3. Dig. L. 17, fr. 1.

4. Cf. "beatitudines seisinae"—a common locution.

It is of ancient origin and seems to be ascribed by Mascardi to a gloss on a passage in the Libri Feudorum.[5] It was at any rate in common use among the medieval civilians and canonists in the practice of the law courts. The Roman jurists, so far as is known, did not employ it, though the idea it expresses was familiar enough to them. They employed other maxims which were nearly equivalent, e. g., "in pari causa possessor potior haberi debet" (Dig. L. 17, fr. 128), and "cum de lucro duorum quaeratur, melior est causa possidentis" (Dig. L. 17, fr. 126 § 2).[6]

In a MS. of the "De Lingua Latina" (Cv. 17) of the antiquarian Varro it is said "beatus est ille qui multa bona possidet." This pagan sentiment, if attributable to Varro,[7] is, of course, in flat contradiction of the Sermon on the Mount, but Ulpian in a text of the Digest (L. 16, fr. 49 pr.) tells us that things got the name of *bona* because *beant*, i.e., beatos faciunt (*beare* meaning *prodesse*). Commenting on Ulpian's text, Alciatus says, in altruistic vein, that the rich are happy because they can and ought to be of help by their riches to others—"beati dicuntur divites quia caeteris prodesse possunt et debent" (Alciat., II, 1099).

It is not, however, in the sense of the rich being happy that "beati possidentes" is used in the law sources. It is employed simply to indicate the fortunate position of possessors when questions of property and other real rights are agitated or set up. In the thesaurus of axioms of jurisprudence by Barbosa and others (the only collection of the kind in which I have found our maxim cited)[8] a reference is made to B. Carpzovius. This writer in his "Disputatio Juridica de Inhibitionibus C. P. S.," etc. (Pos. I, p. 1 sq.) 1649, says, "Vulgatum quod est J.ctis dicterium; beatos esse possidentes; nunquam non verissime dictum quotiescumque dictum fuerit,"[9] and he gives a variety of illustrations to show how plain-

5. Lib. Feud., II, 27, voce "requirat"; *Mascardus*, "de Probationibus," Vol. III, conclusio 1195, 2. U. Zasius in tit. Inst. de actionibus discusses the maxim as relating to onus probandi and gives an illustration. (See *Zasius*, "Opera," IV, 21, 37, 38.)

6. See also Dig. XII, 5, fr. 8; XII, 7, fr. 5 pr.; XXIX, 1 fr. 36, § 3; X, 3 fr. 28.

7. This text is generally held to be a gloss. Varro, however, l. c., derives *dives* from *divus* as being one "qui, ut deus, nihil indigere videtur."

8. "Thesaurus locorum communium jurisprudentiae axiomatorum," ed. 1707.

9. Cf. also his Dissertatio Inauguralis, "de Inhibitionibus," where he says (§ i) "Quanti possessionis semel acquisitæ sint commoda omnibus, qui superficiariæ solum jurisprudentiæ principiis tincti sunt, facile patet, possessor enim non solum ab onere probandi est immunis, sed etiam eousque in possessione acquisita defenditur, quousque pars adversa de jure suo non clara dedit documenta. Beati proinde non immerito dicuntur possidentes," etc.

tiffs even with valid title of property, but without possession, have often to abandon their claims rather than bear the costs, delays, etc., of an action in rem. He adds that one jurist enumerates no less than a hundred advantages of possession. But as Savigny, in his well-known treatise on possession, has shown, such enumerations of the fruits or advantages of possession are unreal; the same consequences are to great extent either repeated under different names or else the possession is found to be only one element in producing the effect attributed to it. According to him there are just two consequences attributable to possession exclusively, as such, viz., the possessory interdicts and usucapion (prescription).[10] It has, however, been pointed out by more recent writers that even this goes too far, because for usucapion the additional conditions of bona fides and justus titulus must be present; so that the interdicts were really the sole advantages which possession by itself produced in Roman law.[11] Still, subject to the explanation just made, there is no impropriety, but rather a convenience, in speaking of the benefits of possession with reference to particular institutions where it is an essential element, whether in Roman or modern law.

II

Possession Is Nine-Tenths of the Law

The adage is so given by Wharton in his Law Dictionary. No other law lexicon and no collection of legal maxims, so far as known to me, notice it at all. It is in no way derived from the Roman law nor is any equivalent apparently to be found in any continental treatise on law. It is equally unknown to Scots law and is, in short, purely English. Wharton oddly says:

> "It [the adage] does not mean that the person in possession can only be ousted by one whose title is nine times better than his [that would indeed be a curious case!] but it places in a strong light the legal truth that every claimant must succeed by the strength of his own title."

No authority for the maxim is cited by Wharton and I have been unable to trace its source or its application further than occasional use in comparatively modern judicial dicta.

The original form of the proverb, however, seems to have been "possession is nine (or eleven) points (or parts) of the law."

10. *Savigny*, "Besitz," 7th, ed., II, § 3, n. 2.
11. See *Maynz*, I. p. 393 n. 77; *Cornil*, "Traité, de la Possession," Bruxelles, 1905, p. 3, n.

As is pointed out in the Oxford English Dictionary, nine (or eleven) points are here taken enumeratively with reference to an imaginary sum total of ten (or twelve).[12] They indicate, therefore, merely a large majority of possible pleas or points of law that might be set up in a litigation—ten or twelve being representative symbolic numbers. Murray cites instances of the use of "eleven points" in the seventeenth and eighteenth centuries, and refers to Miss Edgeworth's novel, "Patronage" (ed. 1834), for the use of the form "nine points." Miss Edgeworth makes the quirky attorney in the novel say "possession being nine points of the law."

But whether in the form of "nine-tenths" or "nine (al. eleven) points" of the law, I think we may conclude that it was first used by lay writers as a colloquialism and that it afterwards acquired some sort of currency in the law courts. It would seem that when forensically used, it was generally, if not always, confined to possession of land or other real rights. Referring to the statute 5 Richard II, Stat. 1. c. 8, which prohibits violent entry upon land in possession of a tenant, Justice Fry said, "This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land and which gave rise to the old saying that possession is nine points of the law.[13] But in law our maxim, as I have said, had really no special significance. It is but another way of saying "beati possidentes" or "melior est conditio possidentis" or other similar maxims expressing commoda possessionis.

12. See Murray, Eng. Dictionary, vv. "point" and "possession."
13. *Beddell* v. *Maitland* (1881), L. R. 17, Ch. Div. 174.

FAULT, RISK, AND APPORTIONMENT OF LOSS IN RESPONSIBILITY

By René Demogue[1]

Quand, en dehors de tout contrat, un dommage a été causé par une personne à une autre, la question la plus importante qui se pose pour le juriste est de savoir dans quels cas il en est dû réparation, à quelles conditions une indemnité peut être reclamée par la victime. Parmi ces conditions une surtout soulève de graves débats. A côté des points assurément délicats de savoir quand l'état psychologique de l'auteur du dommage permet de le rendre responsable, quand il existe une relation causale entre l'acte de cet auteur et le préjudice subi, on discute surtout le point de savoir si l'on doit être seulement responsable en cas de faute commise: imprudence ou negligence, au si l'on doit répondre de tout risque crée.

Historiquement, il est certain que les civilisations primitives pour satisfaire le sentiment de vengeance de la victime lui accordaient une satisfaction par cela seul que sa personne ou ses biens avaient été matériellement atteints. Mais le droit avait bientôt commencé à évoluer vers l'idée que certaines législations modernes, comme le Code Napoléon, ont nettement consacré: on n'est responsable que lorsqu'on a commis une faute, c'est à dire causé un préjudice intentionnellement, par imprudence ou par négligence.

Depuis lors, à une époque récente, les jurisconsultes de divers pays ont agité la question de savoir s'il ne conviendrait pas d'abandonner le principe limitant la responsabilité au cas de faute, pour dire que quiconque crée un risque de dommage répond de celui ci s'il vient à se produire.

Pour savoir quelle est sur ce point la solution ou l'ensemble des solutions qu'il convient de recommander au législateur, il faut préciser le terrain sur lequel il convient de se placer, les idées que peuvent être adoptées et la manière suivant laquelle on peut les com-

1. [The author is already favorably known to American readers through the translation of the first two hundred pages of his "Les Notions Fondamentales du Droit Privé" (1911), which was published as a part of "Modern French Legal Philosophy," Modern Legal Philosophy Series, Vol. VII, pp. 347-572 (Boston, 1916). A critical account of his position as jurist and legal philosopher by Arthur W. Spencer appears at pp. xlvii et seq. of the above translated volume, and a list of his writings at p. liv of the same volume. He was for several years professor in the faculty of law of the University of Lille, and he is at present professor agregé of the faculty of law of the University of Paris.—Ed.]

biner d'une façon harmonieuse. Cette méthode permet mieux de dégager les éléments complexes du problème aux aspects variés que nous examinons.

I

La doctrine de la responsabilité qui exige une faute pour que l'on soit obligé à indemnité est en connexion étroite avec les théories individualistes et libérales qui ont eu tant de succès pendant une partie du XIXe siècle. Elle considère que les hommes sont en principe indépendants les uns des autres et que personne ne doit de dommages intérêts à autrui s'il se conduit avec prudence. Chacun garde définitivement les bénéfices que le hasard ou son activité lui procurent, inversement il supporte seul les dommages résultant des événements de la nature ou des faits des autres hommes. On admet seulement, pour prévenir les actes maladroits ou malveillants que ceux ci donnent lieu à une sanction civile.

Les partisans de théories nouvelles: de la théorie du risque comme ont dit fréquemment, sans l'exprimer formellement, se rapprochent davantage du point de vue social, qui est l'angle véritable sous lequel le problème doit être envisagé.

Quand un dommage subi par une personne á pour cause l'acte d'une autre, il s'agit moins de déterminer si l'auteur du préjudice en répondra que de savoir qui supportera définitivement la perte matérielle qui s'est produite. Sera ce l'auteur? Sera ce la victime? Il faut toujours que quelqu'un d'entre eux ou que les deux à la fois le supportent. Quelles sont les solutions les mieux adaptées aux diverses fins sociales que l'on peut poursuivre en ces matières?

On peut s'inspirer surtout de ce besoin de securité que est un des plus importants dont le droit doit se préoccuper. Mais tout de suite apparait une grave difficulté, car dès que l'on veut préciser, on s'aperçoit qu'il y a ici deux conceptions de la securité sinon antinomiques, du moins assez divergentes. On peut considérer le désir de securité de l'auteur d'un dommage ou au contraire se placer au point de vue de la victime.

En face de la théorie de la responsabilité l'auteur d'un préjudice ne se sent en securité que s'il peut raisonnablement espérer échapper à toute responsabilité par une conduite moyenne, c'est à dire en s'abstenant de dol ou de fautes d'une certaine gravité. Mais le rendre responsable de ces fautes venielles que le plus grand saint commet sept fois par jour, ou à plus forte raison mettre à sa charge les conséquences de son simple fait, c'est lui enlever toute tranquillité d'esprit. La préoccupation de la securité de l'auteur

conduirait donc à une théorie très étroite de la responsabilité civile. Au contraire, ce qu'implique de besoin de securité de la victime, ce que demande le titulaire du droit lesé, c'est que la valeur pécuniaire representée aujourd'hui par tel ou tel bien se perpétue entre ses mains sous une autre forme le jour où elle aura été détruite ou atteinte par le fait de l'homme. Peu lui importe donc que l'auteur de l'acte soit un aliené ou une personne raisonnable, une personne en faute ou à l'abri de tout reproche, et s'il y a imprudence commise, qu'elle soit grave un légère. Elle demandera donc une large théorie de la responsabilité.

De ces deux points de vue cedendant assez éloignés l'un de l'autre, se dégage cependant une certaine idée commune. Faute de mieux, auteur et victime demanderont tout au moins à être fixés à peu près à l'avance sur l'étendue des pertes dont ils devront supporter le poids. Ils seront donc peu favorables à de très larges pouvoirs donnés au juge.

Sauf ce trait commun, il faut bien reconnaitre qu'il y a opposition entre les désirs également respectables de l'auteur et de la victime. Toutefois cet antagonisme ne se présente pas avec le caractère social qu'on serait théoriquement tenté de lui attribuer. On serait porté à croire que les théories les plus larges de la responsabilité sont les plus favorables aux classes dites possédantes à qui elles accordent une certaine perpétuation de leurs biens. Mais ce serait oublier qu'à côté des biens extérieurs, il y a la vie des personnes, leur integrité corporelle qui constituent des droits susceptibles d'être atteints et en quelque sorte le patrimoine nécessaire des plus pauvres. Aussi a-t-on vu les classes populaires réclamer vivement certaines extensions de responsabilité: notamment en cas d'accidents du travail et au cas d'accident causé par des automobiles. Au contraire les classes possédantes ont été moins zelées en general à réclamer des extensions de responsabilité. Car elles savent qu'il ne suffit pas d'avoir une action contre une personne responsable. Il faut encore, pour que l'action soit utile, qu'elle soit dirigée contre une personne solvable. Si l'on se place au point de vue de la securité, notre problème apparait donc comme mettant en conflit les désirs raisonnables de l'auteur de la victime et même sur le terrain social, comme pouvant mettre aux prises les classes possédantes et celles moins fortunées.

Ce conflit ne se présente pas toutefois à toutes les époques avec le caractère aigu qu'il devrait logiquement présenter. Sentiment psychologique, le besoin de securité peut, suivant les temps, s'affiner ou s'atténuer. Il y a des cataclysmes de la vie sociale auxquels on

s'habitue comme aux cataclysmes de la nature. Il a fallu une période de paix prolongée développant en nous le besoin de securité pour que les gouvernants, au cours de la présente guerre, songeassent à formuler le principe du droit à la réparation des dommages de guerre. Au contraire on ne songeait pas à indemniser les victimes de la guerre dans les siècles où les luttes contre les armées étrangères étaient fréquentes ou permanentes. C'est pour cette même raison qu' à l'époque actuelle, tout mode nouveau de causer préjudice à autrui, provoque d'ordinaire comme réaction, des efforts pour rendre de plein droit responsable celui qui use de l'engin nouveau. C'est ainsi que le développement du machinisme a amené de nombreuses législations à rendre le patron responsable des accidents du travail survenus à son personnel. De même l'apparition des véhicules automobiles a provoqué dans plusieurs Etats une législation extensive de la responsabilité, en cas d'accidents causés par les conducteurs d'automobiles. C'est ainsi que par un sentiment psychologique assez curieux on se plaint surtout des maux dont on n'a pas encore l'accoutumance. On sent bien moins ceux auxquels les siècles nous ont habitués et qui nous semblent inséparables de l'existence. Le législateur qui a le sens de l'opportunité ne doit pas négliger ce sentiment général et il agira sagement en se préoccupant surtout des nouvelles chances d'accidents que les découvertes scientifiques et le progrès industriel peuvent créer. Malgré tout, c'est du point de vue de la securité tant de l'auteur que de la victime que le problème est le plus ardu. Peut être l'est il moins en considérant les choses d'un point de vue plus nettement social.

Comme but principal à la législation sur la réparation des dommages, on peut fixer surtout une fin préventive. On peut considérer, non sans raison, que la meilleure législation civile comme la meilleure législation criminelle est celle qui empêche les faits dommageables de se multiplier, car elle a ce résultat économique important de raréfier des pertes considérables de la richesse générale.

Cette considération permet tout naturellement de justifier ce principe: la responsabilité du dommage entier doit peser sur celui qui, sciemment ou par méchanceté, a commis un délit civil. Elle permet même de justifier une responsabilité supérieure au dommage causé: je veux dire une condamnation à une peine privée. Pour prévenir plus sûrement l'acte dommageable, surtout s'il n'y a pas dans l'espèce de peine publique, il peut être utile de condemner le délinquant à une indemnité élevée, fut elle supérieure au préjudice qu'elle a produit.

L'idée préventive, dont le droit civil ne peut pas faire abstraction conduit également à dire qu'en dehors de toute intention mauvaise, celui qui a causé un dommage doit être responsable si une faute peut lui être imputée. Les dommages intérêts auxquels il sera condamné l'inciteront à être à l'avenir plus circonspect.

Mais ici se présente une question délicate. Y a-t-il lieu de faire varier la responsabilité suivant la gravité des fautes? Du point de vue purement préventif, ou pourrait soutenir que les fautes légères se commettant plus facilement, celles ci doivent être sanctionnés au moins aussi sévèrement que les fautes graves. Mais peut être est il plus adapté aux fins poursuivies de se préoccuper davantage des fautes lourdes. Ce n'est pas que le dommage qu'elles causent soit toujours le plus grand. Une grave imprudence peut n'avoir produit qu'un faible préjudice matériel. Inversement une faute très légère, comme une inattention de quelques secondes de la part d'un conducteur de véhicule, peut avoir comme conséquence un accident mortel. Mais en prévenant les fautes, la société peut viser particulièrement à raréfier les imprudences les moins excusables, les fautes légères étant en quelque sorte fatales. En tous cas, ce point de vue préventif ne pourrait justifier que la responsabilité de celui qui a quelque reproche à se faire. Il ne pourrait pas servir de fondement à la théorie de la responsabilité sans faute.

Sur le terrain économique, ou peut aussi se poser d'autres questions, concernant non plus la consommation des richesses, mais leur production. Est ce qu'une responsabilité trop lourde pesant sur ceux qui agissent, les rendant complètement responsables de leurs fautes mêmes les plus légères, ou même de leur simple fait, sans qu'aucun reproche puisse leur être adressé, n'est pas de nature à décourager les activités? Ne faudrait il pas par suite se montrer défavorable à toute extension un peu considérable de responsabilité? La difficulté a été aperçue par les partisans de la théorie du risque, et Saleilles y a répondu en disant que la certitude d'être responsable pouvait finalement se supporter plus facilement que l'incertitude résultant d'un large pouvoir donné au juge. L'argument ne nous semble pas pleinement décisif: c'est en effet prétendre que la certitude du mal, c'est à dire de la responsabilité, est meilleure que l'espoir incertain d'échapper à une condamnation à des dommages intérêts.

Nous croyons qu'un système de responsabilité civile même élargi est compatible avec le développement économique d'une nation, tout au moins dans une certaine mesure, mais pour une autre raison que celle présentée par Saleilles. Si une personne se livre à

une activité économique et qu'elle prétend, pour échapper au dommage qu'elle peut causer, que cette responsabilité serait ruineuse pour elle, elle établit par la même que son activité est bien peu profitable à l'ensemble du pays, puisque le bénéfice qu'elle en retire ne suffit pas à compenser les pertes qu'elle provoque. Cela est particulièrement vrai s'il s'agit d'une personne qui, d'une façon continue, en vertu d'occupations professionnelles, se livre à une activité. Celle ci n'est utile au point de vue général que si elle compense et au delà les destructions qu'elle produit. Cette idée a évidemment moins de force lorsqu'il s'agit d'un acte d'activité isolé, car tout acte comporte certains chances de préjudice à autrui. Si celles ci sont tout à fait faibles et éloignées, il serait regrettable que l'activité de l'auteur fut paralysée. L'idée cesserait même complètement d'être vraie au cas où l'auteur agirait moins dans son intérêt que pour le bien général. Ainsi un savant chimiste pour faire certaines découvertes dont l'industrie nationale plus que lui même tirera profit, se livre à expériences. Si un tiers est blessé par une explosion que l'une d'elles a causée, il serait regrettable que le savant agissant dans intérêt générale supportât un préjudice dont il n'a que le profit partiel.

Au lieu d'aborder la question de la responsabilité du côté purement économique, on peut la prendre par un aspect plus social en se demandant chaque fois qu'un dommage a été causé, comme il y a nécessairement une perte qui doit être supportée par quelqu'un: auteur ou victime, lequel peut plus facilement en subir le poids.

Ici différentes idées peuvent entrer en cause. Tout d'abord comment ne pas faire place à cette remarque d'ordre essentiellement pratique, mais qui est à la base de théories importantes comme la philosophie de la solidarité: à savoir qu'une perte est d'autant plus facilement supportée qu'au lieu de peser sur un seule, elle se divise entre plusieurs ou, à plus forte raison, entre un grand nombre de personnes. Si au lieu de faire subir le préjudice tout entier par une des parties en présence: auteur ou victime, on le fait supporter par toutes les deux à la fois, la charge en deviendra déjà moindre. Cette idée fort simple a l'avantage de pouvoir être utilisée pour résoudre les cas les plus embarassants de notre matière: ceux où aucune faute ne peut être imputée à l'une des personnes en cause, ceux aussi où l'on ne peut reprocher soit à l'auteur, soit à la victime que ces fautes très légères dont il n'est pas possible de s'abstenir complètement.

On peut dire à l'appui de ce partage des pertes entre l'auteur et la victime qu'il est généralement en harmonie avec la réalité des

faits. Quand un dommage résulte du heurt de l'activité de deux personnes, il est fréquent que chacune ait par quelque faute légère restée inconnue contribué à la réalisation du dommage. Le présumer en dehors de toute preuve est acceptable. Car il est sage de présumer ce qui est le plus fréquent, plutôt que d'ériger en présomption les cas exceptionnels.

Ce partage des pertes rectifie en outre la part que le hasard peut avoir dans certains dommages. Dans une rue obscure deux individus se heurtent sans s'être aperçus; le premier est robuste, le second est un homme âgé marchant d'une allure chancelante. Il est probable que celui ci sera renversé plutôt que l'autre. Est il pleinement acceptable qu'il supporte seul le dommage pouvant résulter de cet accident alors que le premier ne subira aucune perte? Il semble bien préférable de dire que le préjudice résultant du heurt de ces deux activités sera partagé entre les deux intéressés.

D'une mainière plus large, le partage des responsabilité est en harmonie avec les théories de solidarité sociale qui depuis un quart de siècle ont pris une si grande importance. On considère comme raisonnable que dans tout groupement social: Etat, ville, il se produise une certaine mise en commun des infortunes: les plus riches, ceux qui ne sont pas atteints directement, aidant les victimes de cataclysmes. Pourquoi cette solidarité n'existerait elle pas dans ce groupement restreint que constitue l'auteur et la victime? On ne peut objecter que la solidarité se conçoit dans les groupements volontaires, mais non pas dans ceux où l'intention des parties ne joue aucun rôle. Un Etat, une ville ne sont que dans une mesure limitée des groupements in volontaires. Il suffit, pour que les principes solidaristes puissent s'appliquer dans un groupement, que les membres de celui-ci aient conscience d'un certain lien entre eux. Cela seul fait qu'il n'y a rien de choquant à répartir entre les membres du groupe un dommage subi par l'un d'eux.

Cette répartition de la perte à subir entre l'auteur et la victime ne présente comme inconvénient qu'une certaine complication. Si tout dommage illicite donne lieu à un compte entre ces deux personnes, ne va t'on pas multiplier les procès? L'objection n'est pas décisive. Car il peut y avoir des ententes amiables. En outre il n'est pas à redouter que les procès soient beaucoup plus nombreux qu'aujourd'hui où les questions de responsabilité sont une des sources les plus fréquentes de litiges.

Quand on se préoccupe de déterminer qui est responsable d'un dommage ou qui, de l'auteur ou de la victime, doit supporter la perte qui s'est produite, on ne peut lorsqu'on examine qui peut en

fait supporter plus facilement cette charge, faire abstraction de cette institution si importante dans nos civilisations modernes: l'assurance.

Il est à souhaiter lorsqu'un dommage s'est produit que le poids en retombe finalement sur celui qui était le mieux à même de s'assurer. En effet quant à lui, il ne supporte en réalité aucune perte puisqu'il est couvert par son assureur. D'autre part, la compagnie d'assurance ne peut se plaindre d'une obligation qui est sa raison d'être et qu'elle supporte facilement. S'il s'agit en effet d'une assurance mutuelle, l'indemnité versée sera supportée finalement par la masse des adhérents. S'il s'agit d'une assurance à primes fixes, c'est encore par les mille canaux des primes versées par les assurés que l'assureur sera remboursé de la somme qu'il paye. Dans un cas comme dans l'autre, les pertes sont finalement disséminées, c'est à dire rendues faciles à supporter.

Mais quel est celui de l'auteur et de la victime qui est le mieux à même de s'assurer, ou plus exactement quels sont ceux qui en fait, pour des raisons diverses, s'assurent le plus fréquemment? La question est assez délicate à résoudre puisqu'il existe d'un côté des assurances dites de choses par lesquelles le propriétaire d'un bien se garantit contre tel sinistre qui pourrait l'atteindre: incendie, vol, etc., et de l'autre, des assurances de responsabilité par lesquelles une personne se protège contre les actions en indemnité dont elle pourrait être l'objet. Les premières sont passées par les futures victimes, les secondes par les auteurs des dommages.

Il serait donc à souhaiter que dans chaque cas le législateur tient compte de la pratique pour établir dans les espèces difficiles à résoudre qui doit être responsable.

Le législateur peut d'ailleurs être guidé sur ces points par deux remarques. Tout d'abord ce sont les personnes appartenant aux classes possédantes qui s'assurent le plus. Au contraire l'assurance, dans bien des pays, n'est pas pratiquée dans les milieux populaires. L'ouvrier est fréquemment insouciant du lendemain. Malgré l'intérêt tout particulier qu'il aurait à se prémunir contre des risques qui sont pour lui particulièrement difficiles à supporter, il ne s'assure pas ou ne s'assure que rarement.

En outre ce sont ceux qui par une activité régulière et spécialement par une activité professionnelle sont le plus exposés à causer ou à subir un dommage qui s'assurent le plus fréquemment. Un chef d'établissement industriel exposé à causer des accidents à son personnel par défaut de précautions s'assurera plus fréquemment

qu'un cultivateur qui n'emploie qu'exceptionnellement des ouvriers pour l'exploitation de ses terres.

Rendre responsable celui qui s'est assuré soulève toutefois une objection. N'est ce pas rendre le plus prudent, celui qui a su prévoir, et favoriser l'insouciance? Cela est exact. Mais il faut reconnaitre que la situation défavorable ainsi faite au plus prévoyant aura seulement pour conséquence de lui faire supporter définitivement le poids des primes d'assurance que sans cela il a déja volontairement déboursées.

Les raisons qui nous font admettre assez volontiers la responsabilité de celui qui peut s'assurer, c'est à dire faire que finalement l'obligation d'indemnité se dissémine entre un grand nombre de personnes nous conduisent à une autre conséquence. A l'encontre des théories anciennes qui admettaient difficilement la responsabilité de l'Etat et des Administrations publiques, il convient au contraire de proclamer sans difficulté la responsabilité des personnes morales du droit public. Le trésor de celles ci étant alimenté principalement par l'impôt, c'est à dire par des versements de l'ensemble des citoyens, les condamnations prononcées contre elles seront en dernier lieu facilement supportées. On peut donc sans inconvénient, comme le font dans certains cas particuliers les lois ou la jurisprudence de certains pays, admettre la responsabilité de l'Etat même en dehors de toute faute de sa part.

II

Dans quelle mesure peut on essayer de tenir compte des remarques d'ordre général que nous venons de faire, pour construire une théorie générale ayant un caractère suffisamment harmonieux?

Une grande distinction doit tout d'abord être faite entre les cas où il existe à la charge d'une des parties en présence une faute d'une certaine importance et ceux où cette faute ne se rencontre pas.

Dans le premier cas, la solution à recommander au point de vue législatif est facile à déterminer s'il y a eu intention mauvaise. Elle est déjà acceptée par les législations positives. Si l'auteur du dommage a provoqué celui ci en pleine connaissance de cause, soit qu'il ait agi uniquement par méchanceté, poursuivant la victime de sa haine, soit que poursuivant un but différent d'une satisfaction de vengeance il ait prévu la préjudice comme certain, la solution s'impose. L'auteur doit être pleinement responsable du préjudice qu'il a causé. Inversement la victime ne pourra réclamer aucune indemnité si elle a souhaité le dommage pour causer des ennuis à l'auteur, ou si elle en a accepté l'idée par un désir de destruc-

tion qui a saisi son esprit: par exemple au cas où un ouvrier en face d'un wagonnet qui circule sur une voie dans des conditions normales s'abstient volontairement de se détourner. Il est évident que l'utilité sociale commande de se montrer sévère pour de pareils faits. Il faut rendre plus rares les destructions volontaires de richesses. La securité que peut désirer celui dont l'acte volontaire a causé le dommage ne peut s'opposer ici à sa pleine responsabilité. De quoi pourrait d'ailleurs se plaindre celui qui a retiré de l'acte volontairement dommageable un profit pécuniaire ou le triste profit moral d'une vengeance satisfaite?

La sévérité avec laquelle on doit traiter de pareils actes fait que non seulement il conviendrait de rendre la personne responsable de toute la perte qu'elle a provoquée, mais que, dans les cas exceptionnels où le profit retiré par le délinquant dépasserait le dommage causé, tout l'enrichissement procuré devrait être restitué. Ainsi par ses manoeuvres, un industriel provoque une grève chez un concurrent et il profit de la circonstance qu'il jouit d'un véritable monopole de fait pour surlever ses prix. Il devra rendre à la victime le supplément de bénéfices qu'il a ainsi obtenu.

On peut également admettre que, dans certains cas à déterminer, l'indemnité à verser à la victime pourra dépasser le dommage et constituer ainsi une véritable peine privée. Il y a des hypothèses où à défaut de peine publique il convient pour l'exemple de frapper sévèrement l'auteur volontaire d'une mal causé à autrui.

Beaucoup plus nombreuses sont les situations où l'auteur d'un dommage peut se voir reprocher non pas une intention mauvaise, mais une imprudence, une négligence. C'est le cas classique de l'accident et une des sources les plus nombreuses de procès.

Ici diverses considérations peuvent entrer en conflit. La société doit désirer lutter contre les fautes. Elle doit les prévenir en établissant une sanction civile qu'il serait naturel de faire varier suivant la gravité de la faute. Car s'il est naturel de faire peser la perte toute entière sur celui qui a commis une faute grave, une négligence que n'aurait pas commise une personne d'une prudence moyenne, il n'en va plus de même lorsqu'il s'agit d'une faute légère. Celle ci peut avoir causé une perte pécuniaire considérable, hors de proportion avec la sanction que mérite l'auteur de l'acte. D'un autre côté la victime qui n'a aucune faute à se reprocher, peut avec raison réclamer une indemnisation complète et faire valoir qu'entre elle qui n'a aucun reproche à se faire et l'auteur qui a commis une imprudence même légère, la balance doit plutôt pencher de son côté.

Il nous semble que le conflif doit se résoudre par une distinc-

tion que nous avons déja laissée pressentir entre les fautes dépassant ce qu'on peut exiger d'une prudence moyenne et les fautes moins importantes. Si l'on peut faire à l'auteur un reproche important, on peut sans inconvénient faire peser sur lui comme sanction l'entière responsabilité. Si au contraire il n'a commis qu'une négligence tout à fait pardonnable, nous croyons qu'une autre solution s'impose. Nous l'indiquerons dans un instant en parlant du problème de la responsabilité sans faute.

Les considerations qui nous ont servi jusqu'ici ont été exclusivement tirées de l'intérêt social qu'il y a à préventir les actes mal intentionnés ou fautifs. L'importance du but à atteindre fait que nous n'avons pas eu à tenir compte de la plus ou moins grande facilité pour une des parties à supporter le dommage. Il n'en est plus être complètement de même, maintenant que nous arrivons aux hypothèses les plus délicates: celles où aucune faute quelque peu importante ne peut être reprochée ni à l'auteur ni à la victime, où ces personnes sont tout au plus coupables de fautes légères. En pareil cas, il y a lieu d'établir une distinction entre les dommages qui résultent de l'emploi d'engins dangereux et ceux qui se sont produits sans cette intervention.

Le développement du machinisme et, d'une façon plus générale, l'importance de plus en plus grande des sciences appliquées ont rendu plus fréquents certaines installations, certains emplois de substances, d'engins, de moteurs dont on se passerait malaisément, qui augmentent l'agrément ou les commodités de la vie et qui ont ce caractère commun d'être dangereux. J'entends par là non seulement qu'ils exigent certaines précautions pour leur maniement, mais que, même toutes les mesures de prudence actuellement connues étant prises, des accidents peuvent quand même se produire assez facilement. Il suffit de citer parmi ces causes de dommages: les explosifs, les liquides inflammables, les machines à moteur inanimées, les automobiles, le gaz, l'électricité, l'acétylène.

Lorsqu'ils sont apparus successivement et que la diffusion de leur emploi a révélé en même temps que leurs avantages les inconvénients qu'ils pouvaient produire pour les tiers, on a tout d'abord prétendu que, dans ce cas comme dans les autres, la victime devait établir qu'une faute s'était produite. Toutefois, ayant vaguement conscience que cette solution n'était pas très satisfaisante, les tribunaux se sont souvent ingéniés à découvrir une faute même légère de celui qui employait l'organisme dangereux, afin d'en faire la base d'une responsabilité.

En sens inverse, les partisans de la théorie du risque ont pro-

posé d'admettre que celui qui emploie l'organisme dangereux serait toujours responsable du tort qu'il pourrait causer. Mais l'argumentation que l'on a présentée pour soutenir ce système parait assez faible. On s'est contenté de dire que l'auteur et la victime étant tous deux exempts de faute, l'auteur devait être responsable, car c'est lui la cause, c'est son acte qui a servi de prétexte à la fatalité. C'est une argumentation assez matérialiste qui se contente de faire remonter à la cause la pleine responsabilité de toutes les conséquences.

Nous croyons que le problème est insoluble en partant du point de vue qu'on ne peut être responsable que si l'on à encourue quelque reproche et que l'erreur de l'argumentation précédente est de chercher une sorte de faute dans le seul fait d'avoir causé le dommage. Sans doute lorsqu'une personne décide de faire emploi d'un engin dangereux, cet acte de volonté a été précédé d'une période de réflexion où la possibilité du dommage a pu être envisagée. Mais il n'y a pas de rapprochement à faire entre le cas où une faute a été commise en employant une chose sans les précautions voulues et celui où l'usage d'un engin dangereux ne se rattache à aucune imprudence.

Nous sommes cependant favorables à la responsabilité en dehors de toute imprudence ou négligence, de celui qui emploie un engin dangereux. Tout d'abord, cette personne ne peut se plaindre de supporter le poids du dommage qu'elle a proyoqué. Elle utilise cet engin pour un avantage personnel, elle ne peut se plaindre d'en subir les inconvénients. Elle ne peut objecter que cette responsabilité lui rend finalement l'emploi de cet engin onéreux. Socialement cet emploi n'est utile que si le profit, lequel revient principalement à qui utilise l'engin, depasse le préjudice causé à des tiers. Un établissement industriel par ses fumées, par les gaz qui s'en exhalent, rend inhabitable une maison voisine et cause de ce chef à celle—ci une dépréciation de valeur de 50,000 fr. Cette usine n'est économiquement utile au pays que si les bénéfices qu'on en retire permettent de payer sans difficulté la perte subie par lè propriètaire voisin. Sans doute il peut se produire des cas exceptionnels, l'usine même ne travaillant q'avec de très faibles bénéfices peut présenter une utilité au point de vue de la ville, de la nation. On y fabrique un certain outillage pour un port voisin, on y exploite une industrie qu'il ne faut pas laisser tomber aux mains des industriels étrangers. Mais c'est alors à l'autorité qu'il appartient de prendre les mesures nécessaires pour qu'elle ne fonctionne pas à perte. L'industriel qui pour exploiter son industrie lése les droits d'autrui et se livre à

une véritable expropriation pour cause d'utilité privée doit être responsable de cet acte. Mais c'est surtout, comme l'idée précédente l'indique déjà, en se plaçant au point de vue de la facilité à supporter le dommage, que l'on peut découvrir des motifs de solution pour notre difficulté.

On peut faire tout d'abord cette remarque générale que les organismes qu'a multipliés la civilisation moderne sont généralement coûteux. Celui qui les emploie est donc souvent à même de supporter le dommage qu'ils produisent. Appartenant aux classes possédantes, il lui arrivera plus fréquemment de s'assurer. Le mécanisme des assurances se prête d'ailleurs souvent mieux ici à l'assurance par l'auteur du dommage que par la victime.

En fait, lorsque le titulaire d'un droit l'assure contre les sinistres qui le menacent l'assurance n'est pas pratiquée comme un mode général de perpétuer dans un patrimoine la valeur pécuniaire d'un bien en dépit des périls variés qui le menacent. Elle ne fonctionne que comme une garantie contre une catégorie determinée de sinistres à l'exclusion des autres: incendie, vol. Plus fréquemment, les assurances de responsabilité permettent à celui qui fait usage d'une chose de faire que les actions qui seront intentées contre lui ne lui seront pas onéreuses. Elle ont donc un caractère plus général.

Si d'autre part, on considère celui qui fait usage d'un engin dangereux, ce qui á presque toujours lieu d'une façon durable, et celui qui fortuitement en est la victime, on voit que le premier ayant bien davantage son attention attirée sur les accidents possibles sera plus porté à se couvrir par une assurance. Celui qui fait usage du gaz songera plus à s'assurer que le passant qui longeant l'immeuble au moment de l'explosion aura été blessé.

Si nous admettons ainsi la responsabilité de celui qui utilise l'engin, nous serions cependant porté à admettre que la victime supporte une légère fraction de responsabilité. Il ne faut pas qu'une personne soit sans intérêt à éviter un dommage qui peut l'atteindre. Elle doit toujours être poussée à se montrer prudente de son côté pour éviter un accident qui est toujours une destruction de richesses.

Quels seraient les engins dangereux dont l'usage engendrerait ainsi une responsabilité de plein droit? Ce serait au législateur à en donner la liste. Cela lui éviterait, le principe une fois posé, de se perdre pour chaque cas de responsabilité dans les complications d'une législation spéciale.

Même sans l'emploi d'organisme dangereux, un accident peut se produire sans qu'il y ait de faute de part et d'autre. La théorie classique de la responsabilité refuse ici toute indemnité à la victime.

Au contraire les partisans de la responsabilité sans faute admettant qu'il suffit d'être la cause d'un dommage pour devoir une indemnité, admettent là encore la pleine responsabilité de l'auteur. Une solution transactionelle consistant à partager la perte à subir entre l'auteur et la victime nous semble préférable. On ne peut plus parler ici d'un outillage dont on tire un profit, ce qui justifie la pleine responsabilité de l'auteur.

Il faut remarquer en outre que le hasard peut avoir seul déterminé celui qui subit le dommage. Dans une rue obscure deux personnes se heurtent violemment faute de s'être aperçues. Le hasard fera souvent qu'une personne plutôt que l'autre sera renversée.

Cette responsabilité partagée fait que chacun aura un intérêt à se montrer prudent pour éviter un dommage dont il supportera une partie des conséquences. En même temps, dans tous les cas où les conditions exactes fautives ou fortuites, dans lesquelles le préjudice s'est produit ne peuvent être déterminées, on arrive à une solution acceptable, tant pour l'auteur que pour la victime: la responsabilité étant partagée entre elles sera plus facile à supporter. En tant que présomption admise à moins que la victime ne prouve que l'on est dans un cas où l'auteur est complétement responsable, cette solution est beaucoup mieux d'accord que toute autre avec la réalité des faits. Si les conditions exactes dans lesquelles le dommage s'est produit sont restées inconnues, il est plus raisonnable de supposer qu'il y a eu quelque peu de la faute de chacun, plutôt que de penser que l'auteur n'a rien à se reprocher.

Cette solution transactionnelle a tellement de force que les tribunaux reconnaissent assez volontiers que l'auteur est en faute tout en estimant assez bas l'indemnité, ou qu'ils admettent que l'auteur et la victime sont tous deux fautifs et partagent entre eux la responsabilité.

Le partage de la responsabilité étant ainsi le droit commun et ayant pour base non pas une idée de faute, mais la facilité avec laquelle on peut supporter le dommage, ce principe peut recevoir une très large application: il peut être étendu au cas où l'auteur du dommage ne jouit pas de la plénitude de ses facultés mentales, étant aliéné ou enfant en bas âge. Nous sommes en effet en présence d'une de ces solutions mitigées que la vie ne pouvant complètement se pétrir d'idéal, accepte volontiers.

Le partage des pertes dans un cas donné devra se faire entre l'auteur et la victime dès qu'il y aura une atteinte portée au droit d'autrui, c'est à dire une atteinte portée à un intérêt que la victime

pouvait normalement espérer être sauvegardé, comme un droit de propriété, l'intégrité corporelle. Il en serait autrement s'il y avait atteinte à une simple espérance, comme dans un acte de concurrence commerciale honnête. Peu importe que l'auteur n'ait fait qu'user de son droit; en en usant aux détriment d'autrui, il commet une acte dont socialement il peut être utile de déduire une obligation d'indemniser. Il n'y a rien de contradictoire à admettre que l'usage d'un certain droit comporte l'obligation de réparer en totalité ou en partie les dommages qui en résultent.

Les seuls cas où une personne ne pourra exercer de recours à raison d'un dommage qu'elle a causé sont d'abord l'hypothèse où elle a été victime des forces de la nature. Ensuite on peut, bien que la solution soit discutable, admettre qu'il y aura encore irresponsabilité si l'auteur matériel a été dans l'impossibilité physique de prendre les précautions qu'il aurait dû prendre, ou a été obligé d'accomplir l'acte préjudiciable. Ici l'individu n'a été qu'un instrument et on trouvera à côté de lui quelqu'un que l'on pourra rendre responsable: celui qui l'a forcé à agir ou qui l'a empêché d'agir.

POSSESSION

By Henry T. Terry[1]

There has been much difference of opinion among the civilians as to whether possession is a fact or a right. Mostly that is verbal only, whether the simple name possession shall be used to denote the situation of fact presently to be described or some one of the various rights that may relate to or arise from that fact, especially the right which at the end of this article is called a possessory right.[2] The existence of the fact as distinct from the right has not been questioned. In our law there is no doubt that the name possession denotes properly and regularly the fact and not the right.

Possession is a situation of fact in which a person stands in relation to a thing. The purpose of this article is to describe that situation and certain presumptions which the law makes as to its existence. A full description would take much more space than can here be allowed. Only a brief summary or outline can be given, omitting necessarily many important details.

The thing possessed may be corporeal or incorporeal. The possesion of incorporeal things is of course not exactly like the possession of corporeal things. Still it is closely analogous thereto. It is a situation of power and will, and has in the main the same legal consequences, so that it is proper to call it by the same name. The discussion in this article, however, will be confined to the possession of corporeal things.

Possession is actual or constructive. As these expressions will be used in this article, possession is actual when the facts that of themselves really amount to possession actually and presently exist, and in that case only. It is constructive when facts exist on

1. [Born at Hartford, Conn., Sept. 19, 1847; A. B., Yale, 1869; admitted to Connecticut Bar, 1872; Jan., 1877, became professor of law at Imperial University, Tokyo, Japan; returned to United States (1884) and began practice of law in New York (1885); returned to Japan and resumed professorship of law at the Imperial University (1894-1912), of which he is now professor emeritus.

His leading works are: "First Principles of Law," Tokyo, 1878; "Leading Principles of Anglo-American Law," Philadelphia, 1884; "The Common Law," Tokyo, 1898.

Professor Terry has often contributed to law reviews, one of his latest articles being an acute and comprehensive survey of Equity, published in Illinois Law Review, XII, 519 et seq. His "Leading Principles" is everywhere regarded as one of the most important contributions to Analytical Jurisprudence since the day of Austin.—Ed.]

2. *Mackay* v. *McGuire* (1891), 1 Q. B. 250.

the strength of which the law treats a person as if he had possession, confers upon him the same rights or imposes upon him the same duties, whether he really has it or not. But those expressions are often used in other senses, some of which it seems best to mention here to avoid misapprehension. When constructive possession exists as a mere juridical extension, either in time or in space, of an actual possession, e. g., when a possession which began as actual is deemed to continue constructively after the actual possession has ceased, or when a person who has actual possession of a part of a thing, e. g., a piece of land, is deemed to have constructive possession of other parts or the whole of it, the entire possession, the actual and the constructive parts together, is often called actual, as distinguished from a possession that is purely constructive. It is sometimes called constructive actual possession. In this article, however, the two parts will always be distinguished, and the name "actual" applied only to so much of the possession as is really actual in the sense defined above. Therefore a continuous possession may change its character from time to time, being now actual and now constructive.

When one person has possession under or for another, the former is sometimes said to have actual and the latter constructive possession. A tenant or bailee would in this sense be said to have actual and the landlord or bailor constructive possession. Sometimes even the landlord or bailor is spoken of as having actual possession, especially when the holding of the tenant or bailee is precarious and can be put an end to by the landlord or bailor at his pleasure. According to this view it is possible for two persons to have possession of a thing at the same time. It is believed that the true view is that a landlord or bailor has no possession, not even a constructive possession. He may have a right to present possession, but so long as he does not exercise his right by taking possession, he has no possession in fact. A person who has a right of present possession without having possession in fact can have trespass or trover against a wrongdoer who meddles with the thing. That situation of right is sometimes called constructive possession, or is confounded with possession, as will be explained more fully below.

I

The name possession, or actual possession, sometimes denotes seizin. Seizin, however, is not a situation of fact but of right. It does not mean possession of the land, but the actually being vested

with a freehold estate, a right, in the land. By a curious rule of our law, which can be explained by reference to the conditions of the feudal system in which it originated but whose continued existence cannot be justified on any rational grounds, a disseizor gets not only the possession of the land, the corporeal thing, but he acquires an estate, a right, he becomes the tenant; and the disseizee loses not only the possesion of the land and the opportunity to exercise his right in it, but also the right itself; he is no longer tenant. All that he has remaining is what is called a mere right, a right or legal ability to regain his estate by entry or action, a mere jus ad rem, a right to acquire a right, not a jus in re. In such cases the seizin is sometimes called actual possession and the mere right constructive possession, but improperly. The confusion of seizin with possession probably arose from the fact that when the holder of a mere right acquired possession by entry, he thereby acquired seizin, i. e., the estate. In another and secondary sense seizin sometimes denotes the estate itself.

In the distinction between estates and rights in possession and in expectancy the word possession is used in a special sense. An estate or right in possession does not necessarily imply any possession of the corporeal thing. An easement, which never includes any possession of or right to possess the land, may be held in that sense as a right in possession or in expectancy. A right in possession means one that can be presently exercised, as distinguished from a right whose exercise is deferred though it exists as a present right.

Adverse possession is possession to which an additional element, an express or implied claim of a right, is added. Possession in itself, as will be presently explained, does not in our law imply any such claim; "animus possidendi" is not necessarily "animus domini." The possession itself in adverse possession is not different from other possession; but when a question arises whether a person had adverse possession, that question may relate either to the existence of the possession or of the claim that gives it an adverse character, more often the latter. The same facts that are relevant on the one question may also be relevant on the other, but they are not always so; and even if relevant their legal effect may be different; they may be conclusive on one question and not on the other. When a court intends to decide that a person had or had not adverse possession, it frequently says simply possession, so that it is often hard to see whether the court meant to decide that the person had or had not possession at all or that his possession was or was not adverse. Therefore, decisions

on questions of adverse possession must be used with caution, and may not be authorities at all on the question of the nature of possession, even though the court speaks simply of possession.

The question whether possession ever existed must also be distinguished from that of its continuity or persistence in a certain character; whether it has been abandoned or otherwise terminated, or has changed its character from simple to adverse or from actual to constructive or vice versa. There may be a true possession which lasts or retains a certain character for a very short time, even but for a moment, or there may be a rapid succession of possessions by different persons or of different kinds of possession by the same person. Here, too, the same facts may be relevant on both questions, and their bearing on one must be distinguished from their bearing on the other. To avoid confusion from the above-mentioned causes, it is often convenient to put the question so as to relate to the time of the beginning of the possession, to ask whether a person ever took or acquired possession, or whether he did so at a given time. How long he retained it is a different question.

Actual possession of a thing is made up of two elements, power over the thing and will or intent to possess, "animus possidendi." The right of ownership in a thing includes the right to possess it and to use it in any manner. The possibility of such use depends upon the relation in which the owner stands to the thing and the non-interference with it by others. These latter facts, the conditions necessary to the exercise of the right of use, are those to which possession relates. The power, the will, and also the right to possess extend only to securing the conditions which must exist before exclusive use becomes possible. The power, the will, and the right to use lie beyond. Ownership includes both rights, the animus domini includes both intents, the actual enjoyment of ownership includes the exercise of both rights.

Possession in its fullest and most complete form would include the power, so far as that depends upon the relation in space in which the possessor stands to the thing, to use the thing in any manner and entirely to exclude others from interfering with it, and the intent to maintain such a position of power and entirely to exclude others. But possession need not exist in so full a form; much less than that may still amount in contemplation of law to actual possession. The question is: What approximation to such complete power and will will amount to actual possession? What is the minimum of power and will that must be present?

As to power over the thing, there must be some present actual physical power of that sort. A mere right to possess, and a fortiori a mere claim of such a right, is not enough; it is not even evidence of such power, though it may be evidence of will to possess. The power is not merely to do acts which will affect the thing, even physically and directly; there must be some power to use and control it. If a person shoots my horse, his act directly affects the animal; but he does not thereby take possession of it. Still less is it power over other persons whose acts may affect the thing, but power over the thing itself.

The defendant put her hand into a man's pocket with intent to steal a pocket-book. Being suddenly seized by an officer, she quickly withdrew her hand, and in doing so tore the pocket, which caused the pocket-book to fall out. She never actually touched the pocket-book. Held: there was no taking of it by her. To constitute a taking, it was not necessary that it should be removed from the pocket, but she must have had for the moment at least control of it.[3] But where a thief put his hand into a man's pocket, seized a pocket-book and lifted it a little way from the bottom of the pocket, but was stopped before he could get it completely out, it was held that he got a momentary possession.[4] Enticing a hog twenty yards away from the owner's premises and then abandoning it was held not larceny. The possessor must get the animal under his control, his dominion over it must be such as to enable him to assert that dominion by taking actual control or by seizure.[5] But leading an ass fifteen feet from the owner's stable and there killing and abandoning it was held to be larceny, because the thief got a temporary possession.[6] The plaintiff, the mortgagee of furniture, put a man into the house to keep possession, and after a few days sent vans to take the furniture away. The defendant, the mortgagor's landlord, who intended to distrain on the furniture, forbade the plaintiff's servants to take it and threatened to prevent them by force from doing so. The servants, yielding to the defendant's threats, forebore to remove the furniture. Held: there was no conversion of it by the defendant; the plaintiff's man remained in possession. Bramwell, B., thought that there would have been no conversion had the defendant actually used force as he threatened, and said: "If I tell a man he must not take his pistol out of a drawer for the purpose he is intending, and

3. *Com.* v. *Luckies*, 99 Mass. 431, 96 Am. Dec. 769.
4. *Harrison* v. *People*, 50 N. Y. 518, 10 Am. Rep. 517.
5. *Edmonds* v. *State*, 70 Ala. 8, 45 Am. Rep. 67.
6. *Delk* v. *State*, 63 Miss. 77, 60 Am. Rep. 46.

he forebears, or if I tell a man on horseback he must not ride along a particular road, can I be said to convert the pistol or the horse?"[7]

There can as a general rule be no actual possession of land without actually being upon it. "Pedis possessio" is necessary for actual possession. Merely paying taxes, for instance, or executing deeds is not sufficient. Such acts might be done by a reversioner. Pedis possessio is enough. A mere entry on land with intent to take possession will give at least a present possession. Residence on the land or any use of it is not necessary. The statements often found in the authorities, that what is a sufficient possession of land depends upon the situation or nature of the land or the use for which it is fit, that possession must be such as the land admits of, refer rather to the adverse character of the possession or its continuance or abandonment. The above general rule that presence on land is necessary for its actual possession is subject to the exception that having other persons there, e. g., the possessor's family, or even things, especially fixtures, may be sufficient. Pasturing cattle on land seems to be a sufficient manifestation of power for actual possession. Possibly, however, at least when one's things are kept on land, the possession should be regarded as constructive, the keeping the things there being evidence of a will to possess.

In the case of chattels, manual prehension or actual physical contact with the thing is not necessary; but the chattel must be present, and there must be power to take such prehension immediately. A person has no possession of a wild animal which he is pursuing with intent to capture. On the other hand an officer having to seize goods can take possession of them without actually touching them. When goods are in a place, the presence of a person in that place near to the goods, with nothing to prevent him from immediately seizing the goods, there being no one else present with an opposing will to possess, is a sufficient manifestation of power over them, even though such person has no possession of the place.

A mass of iron weighing ninety-three tons lying on land by itself separate from all other iron was sold. The parties stood close to it, and the vendor said to the vendee: "I deliver you this iron." The vendee claimed it as his. Held: the vendee got actual possession.[8]

A manufacturing company occupied a building and kept goods

7. *England* v. *Cowley*, L. R. 8 Ex. 126, 43 L. J. Ex. 80.
8. *Calkins* v. *Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

of theirs in it. They leased it to the plaintiffs, but continued to occupy it and keep their goods there as before. The plaintiffs issued to the company warehouse receipts for the goods, which the company pledged. The company then became bankrupt. Held: the plaintiffs never got possession of the goods, but the company remained in actual possession, so that the pledgees of the receipt got no title as against the assignee in bankruptcy.[9]

When a person has such power over the thing as is above described, he is considered to have sufficient power to exclude others from it, and therefore for possession, unless there is some other person with an antagonistic intent to possess also holding such a position of power. When two persons have power over the same thing, e. g., are living together upon land or keeping their goods in the same place to which they both have access, they may have an intent to hold joint possession or, as to the place or some particular thing in it, one may intend to possess and the other not. In such case their possession is according to their intent; they will have a joint possession or one will have sole possession. In case of a gift or sale by one to the other the possession may pass by the mere agreement.

An aged man dwelt in his own house on his farm, his children living with him working the farm and supporting him, there being no contract giving any of the children any right in the premises and none of them claiming possession. Held: the father alone had possession.[10]

If each person has an intent to possess to the exclusion of the other, ordinarily neither has actual possession, though one may have constructive possession. But one may have a superior kind of power which will give him actual possession. Manual prehension of a thing or presence and actual exercise of control on land will, it is believed, give actual possession as against other ways of exercising power. Perhaps also if one person had the power to prevent the other from using the thing and immediately to exclude him from it, that would be enough, e. g., if one had the other by the collar and by superior strength was holding him helpless or was marching him to the door of a house to put him out. A command by one to the other not to meddle with the thing or to get out of the premises and the latter's obedience would probably be evidence of such superior power but not conclusive. Probably also if the person having

9. *Security Warehouse Co.* v. *Hand*, 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789.

10. *Russell* v. *Scott*, 9 Cow. 279. Compare *Herskill* v. *Bushnell*, 37 Conn. 36, 9 Am. Rep. 299.

a right to possess is in actual possession and a mere wrongdoer puts himself into a position of power with the intent to possess, but does not actually interfere with the rightful possessor's use or control of the thing, the latter's actual possession is not thereby destroyed.

Roberts, a revenue inspector, suspecting a vessel to be a slaver and intending to seize her, went on board and declared that he seized her. He then went ashore and sent a man on board to take charge, the vessel remaining at anchor as before. His declaration of intent to seize her was not, however, made to the persons on board but to other persons. He did not while on board claim any possession, and he had no force to compel submission. So far as appeared to the persons in charge of the vessel, he was on board in the course of his ordinary duty as inspector. There was no evidence that the persons in possession when he came on board abandoned their will to possess; and if an opposing will existed in them, his mere presence on board was not a sufficient manifestation of power.[11]

In *Harrison* v. *People*,[12] the owner of the pocket-book had the will to possess and what would ordinarily have been sufficient power, but the thief's manual prehension of it gave him for the moment a superior kind of power.

The defendant was in possession of a house and denied that the plaintiff had any right in it. The plaintiff, claiming to be the owner, tried to take possession. He crossed the threshold without opposition; but the defendant met him just inside and resisted him by force, so that he withdrew. Held: he never got any possession.[13]

The power necessary for possession at a given moment is such manifested power as is sufficient for that moment. It is not necessary that the possessor should be able to continue his holding. "A powerful ruffian may be within equal reach and sight when a child picks up a pocket-book, but if he does nothing, the child has manifested the necessary power as well as if he had been backed by a hundred policemen."[14] Even if the ruffian takes it from him the next instant, the child will still have had a momentary possession.[15]

A will or intent to possess, animus possidendi, is an essential element in possession. In the civil law that intent must amount

11. *The Josepha Segunda*, 10 Wheat. 312.
12. Supra [note 4].
13. *Williams* v. *McGaffigan*, 132 Mass. 122.
14. *Holmes*, "Common Law," 225.
15. *Harrison* v. *People*, supra; *Lows* v. *Telford*, L. R., 1 App. Cas. 414.

to animus domini. The possessor must intend to hold as owner. That is not necessary in our law. A tenant strictly at will or a precarious bailee undoubtedly has possession. But animus domini includes the intent to possess, and sometimes it is practically easier to prove the larger intent. Therefore acts of ownership are usually evidence of an intent to possess.

The intent to possess is the intent to hold a sufficient position of power and to exclude others from the thing to the extent presently to be mentioned. A mere intent to meddle with the thing or use it in definite ways, even wrongfully, e. g., to destroy the thing or to exercise a right of way over land, or to prevent the owner of the thing from exercising his rights, is not enough.[16] It is not necessary that the possessor shall understand that his intent amounts to animus possidendi or that his relation to the thing has legally the character of possession, if his intent in fact covers the necessary points.[17] Nor on the other hand is it sufficient merely that he himself regards his intent as an intent to possess or supposes that the position in regard to the thing which he intends to hold amounts to possession.[18] But a claim or disclaimer of possession eo nomine is evidence of an intent to possess or not to possess. There is at least a presumption that the actor knows the meaning of his acts.[19]

The intent to exclude others need not be to exclude them entirely. It is not easy to define the extent to which others may be admitted to deal with the thing without infringing too far upon the intent to exclude, because very often even if the possessor loses his actual possession, he retains a constructive possession which is as good for all practical purposes, so that it is not necessary to distinguish between the two kinds of possession. But bearing in mind the relation above mentioned between possession and ownership and the power to use the thing in all kinds of ways that characterizes ownership, it seems that the admission of other persons to exercise definite uses of the thing or to exercise even indefinite uses precariously subject to being excluded at the will of the possessor is not inconsistent with possession, provided that the possessor's own power of indefinite use is preserved to him; for if he loses that, he loses his possession. Customers in a shop, passengers in a vehicle, the family or servants, guests or lodgers of a householder, are admitted only for definite limited uses, not

16. *England* v. *Cowley*, supra [note 7].
17. *Cary* v. *Bristow*, 1 C. P. D. 54, 2 App. Cas. 262.
18. *Revett* v. *Brown*, 5 Bing. 7, 30 Rev. Rep. 526.
19. *Stanford* v. *Hurlstone*, L. R. 9 Ch. 117.

to do what they please with the thing, and their presence does not deprive the owner of his actual possession. In *Russell* v. *Scott*,[20] the children exercised indefinite uses, but only at the father's pleasure. The hirer of a thing may get only definite rights of use; but in order to exercise those rights he must be given its custody in a way that is entirely inconsistent with the letter's exercise of any right of indefinite use. Therefore the letter parts with the possession.

The will to possess, like the power, relates only to the present; there need not be any intent to continue the possession. The finder of a lost article who knows the owner and goes at once to restore the thing to him, has possession until the moment when he hands it over.

The intent is that of the possessor himself. It makes no difference whether others consent to his possession or not, if they are in fact sufficiently excluded.[21] Nor can possession be forced upon a person without his consent. A tenant of land can in fact abandon his possession at any time, even though he has no right to do so and whether the landlord consents or not. He is then out of possession, and no action of ejectment to recover the land will lie against him.[22] However, the intent of the possessor may be conditional upon the consent of others. A person may intend to assume possession only if some one else intends to give it to him, as in some cases where possession is acquired by delivery,[23] in which case the possessor's intention may sometimes be proved by proving that of the other party. A person may agree that he will accept possession of things which may afterwards be put into a certain place for him, so that as soon as they are placed there, even without his knowledge, they will come at once into his possession.[24] In such cases his possession may however be only constructive.

The intent must be manifested by conduct. In the *Josepha Segunda*,[25] the officer's intent to seize was not manifested. Here, as usually, the law takes no account of a person's secret thoughts. It may, but need not be, manifested by express words.

The intent to possess may be conditional on the existence of a certain fact. But it is not true that the existence of a fact

20. *Supra* [note 10].
21. *Loomis* v. *People*, 67 N. Y. 322, 23 Am. Rep. 125.
22. *Allen* v. *Dunlop*, 42 Barb. 585.
23. *Calkins* v. *Lockwood*, supra [note 8].
24. *Pratt* v. *Railway Co.*, 93 U. S. 43.
25. Note 11 supra.

which the possessor supposes to exist is always a condition to his intent actually to possess; even though he would have refused the possession had he known of its non-existence. The motive that induces a person to possess must be distinguished from the animus possidendi. If "A" delivers a chattel to "B" for safe keeeping, and "B" accepts the charge supposing that it is "A's" property, when in fact it belongs to "C," for whom "B" would not have been willing to undertake that responsibility, "B" none the less gets possession. A difficult question has arisen where the thing possessed was different from what the alleged possessor supposed it to be. A mistake as to the identity of the thing which forms the subject matter of a contract may amount to such fundamental error as will invalidate the contract. A question has been raised whether the same principle applies to taking possession, at least when the possession is acquired by delivery, which is a bilateral act including an agreement. In several cases where a valuable gold coin has been delivered and received by mutual mistake for a coin of less value, and the recipient on discovering the true nature of the coin has converted it to his own use, the question whether he was guilty of larceny has been considered to depend upon when he first had the intent to possess, whether at the time when he first received the coin or when he discovered his mistake, on which latter question judges have differed in opinion.[26] If possession is acquired by taking, which is a unilateral act, probably a mistake as to the identity of the thing makes no difference.[27]

II

The law, when it finds a person in a position of power sufficient for possession, makes certain presumptions as to his intent to possess, which may be roughly and approximately described by saying that the person's intent is prima facie presumed to be in accordance with his right or claim of right. A right here means one that exists independently of the possession, which is not acquired or to be proved by the possession itself. Since the intent, as has been said, must be manifested by conduct, these presumptions apply to explain or interpret acts which of themselves might show such an intent. These presumptions are too numerous and complicated to be discussed in detail here.

26. *Queen* v. *Ashwell*, 16 Q. B. D. 190. See also *Reg.* v. *Middleton*, L. R. 2 C. C. 38, 12 Cox C. C. 260; *Chapman* v. *Cole*, 12 Gray 141, 71 Am. Dec. 739.

27. *Hobart* v. *Haggett*, 12 Me. 67, 28 Am. Dec. 159.

What is called detention or natural possession is where a person has such power and control as would be sufficient for possession, but either has no will to possess, or the law by an arbitrary rule denies him possession. Thus a servant regularly has mere detention, not possession, of his master's goods in his custody; therefore he can steal such goods. But a servant may have possession. In the civil law, in which animus domini is necessary for possession, many holdings of things which in our law would be classed as possession are deemed to amount to mere detention, e. g., the holding of a bailee.

To constructive possession power is not necessary, but intent is necessary. This intent is not quite the same as in actual possession. It is not an intent to hold a position of power, though it does include an intent that others be excluded to the extent above described. Constructive possession is important mainly for certain rights which result from it; so that the intent seems to be to hold such a position of right. Since in constructive possession the intent need not be manifested by acts of power, there is often no way in which it can be manifested at all. The existence of the intent is a subject of legal presumptions. When the possession is rightful, those presumptions can not always be rebutted by proof merely that the constructive possessor had in fact no intent to possess, but only by proof that he had an intent not to. The case of there being no one with any actual intent to possess may be the very case that the law intends to provide for. Thus an heir who inherits land may have constructive possession of it as soon as the ancestor dies, though he may not know that he has succeeded. The general rule mentioned above, that a person's intent is presumed to be in accordance with his right, applies to constructive possession, but its application does not always give the same results, because there is no position of power to be accounted for.

Constructive possession arises in the following cases, which will only be briefly mentioned, a full discussion of them being impossible within the limits of this article.

(1) There are a few statutory or customary rules as to when a person shall be deemed to have constructive possession. Several different customary rules among whalers in various seas as to when and how possession of a whale shall be considered to have been taken before actual possession has been acquired, have been upheld by the courts.

(2) Possession once shown to have existed is presumed to continue until it is shown or is presumed under some of the hereinafter-

mentioned rules that it has been abandoned or that some one else has acquired possession. A possession which began as a short or even a momentary actual possession may continue for a long time constructively, or a continuing possession may be actual or constructive by turns.

The plaintiff raked into heaps manure dropped by horses in a street, intending to remove and appropriate it. He went away and left it lying there for a while, and the defendant took it. The plaintiff recovered for it in trover. He got a temporary actual possession of it, which continued constructively in his absence.[28]

The question was whether a woman had converted a watch within six months. On proof of an actual possession of it by her before that time and a demand and refusal within that time, it was presumed that her former possession continued until the time of the demand.[29]

A lawyer who locks up his office and goes home for the night continues in constructive possession.

When a constructive possession would exist under the foregoing rule, if the further continuance of possession would be unlawful, it is presumed to have been abandoned unless there are facts showing a continued intent to possess. If the possession was originally rightful, and while the possessor is out of actual possession but has constructive possession only his right comes to an end, the presumption of abandonment seems to be more than a mere prima facie one. It is believed that it can be rebutted only by proof of some physical dealing with the thing which would amount to a retaking of actual possession, or which, being done with knowledge of the changed situation, shows an intent to retain the possession.

The plaintiff hired land from a tenant for life, his lease expiring on Christmas day, 1848. As the close was overflowed with water during the winter, the plaintiff in November, 1847, drove off his cattle, which he had been pasturing there, and thorned up the gate. On January 6, 1848, the tenant for life died, and two days afterwards the defendant entered upon the land, for which the plaintiff sued him in trespass. Held: He could not recover. His possession was deemed to have ceased when his lessor died, after which it would have been unlawful.[30]

If, however, there has been no change in the possessor's situation as to right since he had actual possession, his merely quitting

28. *Haslem* v. *Lockwood*, 37 Conn. 600, 9 Am. Rep. 350.
29. *Richmond* v. *Nicholson*, 8 Scott 134, 9 L. J. C. P. 1.
30. *Brown* v. *Notley*, 3 Exch. 219, 18 L. J. Ex. 39.

the actual possession does not show necessarily that he has abandoned constructive possession. There is a prima facie presumption of abandonment, but an intent to continue in possession may be shown. The question seems to be one of fact. What facts will be sufficient to rebut that presumption depends upon the circumstances of the case. The nature, situation, and ordinary or possible use of the thing must be considered. It has been considered that mere verbal claims or assertions were sufficient.[31]

Poachers caught and killed rabbits which belonged to the owner of the land where they were caught, and hid them in a ditch, whence some hours afterwards they came back and took them. It was held that they had possession of the rabbits all the time.[32] The hiding showed an intent to keep possession. It was doubtless to prevent others from taking them.

A person wrongfully occupied land which was subject to overflow, using it for pasturage. At a time when a flood was expected he drove off his cattle. Whether he intended to abandon it was held to be a question of fact.[33] The difference between this case and *Brown* v. *Notley*,[34] is that here the possession was always wrongful, there was no change in the possessor's situation as to right.

If, however, the possession of the thing itself is rightful, there is no presumption of abandonment merely because the possessor has no right to keep it in the place where he does keep it.[35]

There are a considerable number of more special rules as to when an intent to abandon is or is not to be presumed, which will not be discussed here.

(3) Constructive possession may be presumed from the existence of a right of possession. This is commonly expressed by saying that ownership draws to it the possession, in which expression ownership must be taken to mean not necessarily full ownership or dominion, but any property right which includes the right of present possession, such as the right of a tenant of any estate in possession, or the hirer of a chattel, but not the right of a reversioner, though he may be the owner. That rule has two quite different meanings. First, any one who has a right of present possession of a thing may sue for an injury to the possession, e.g., may

31. *Fletcher* v. *Fuller*, 120 U. S. 534, 7 Sup. Ct. 667, 30 L. Ed. 759; *Thompson* v. *Burhans*, 79 N. Y. 93.
32. *Queen* v. *Townley*, L. R. 1 C. C. 315, 40 L. J. Q. B. 144.
33. *Webbs* v. *Hynes*, 9 B. Mon. 388, 50 Am. Dec. 51.
34. Supra [note 30].
35. *Metzger* v. *Post*, 15 Vroom. 74, 48 Am. Rep. 341.

have trespass or trover for an injury to a chattel, whether or not he has possession in fact, either actual or constructive. In this case when he is out of possession, it is often said that he has constructive possession. That is a mere misuse of language. His action is based on his right, not on the fact of possession. Secondly, a person who has a property right in a thing, whether full ownership or some lesser right, which includes a right of present possession, is deemed to be in possession, provided no one else is shown to have actual possession or constructive possession under some other principle; so that this rule is a rule of last resort to catch all cases that do not fall under any other rule. If two persons are on land at the same time, each having such power and intent to possess as would give him actual possession were the other not there, so that neither has actual possession, the true owner has constructive possession. So some transactions which are regarded as equivalent to delivery, but which do not give the deliveree actual possession, may give him constructive possession. A symbolical delivery often has this effect. But a mere claim of a right or a transaction or instrument purporting to confer a right, but not actually conferring one, does not give constructive possession; nor does paying taxes on property so claimed.[36]

(4) Constructive possession may depend upon the situation of the thing. When a person has possession of a place or receptacle, he may be deemed or presumed to have thereby possession of things contained in it. The rules as to when he is considered to have or not to have such possession are somewhat complicated, and there is some conflict among the authorities. A not infrequent case under this principle is where a dispute arises between the finder of a thing and the possessor of the place where it was found, as to which has the better right to it. Since mere possession gives a sufficient title as against every person who can not show a better right, and since under this principle a prior possession avails, with certain exceptions which need not be noticed here, against a later one, the question turns upon whether the possessor of the place had constructive possession before the finder took possession. On this question the authorities conflict. Some courts distinguish between a lost article and one purposely deposited in a place and inadvertently left there, holding that in the latter case the possessor

36. *Kraus* v. *Congdon*, 161 Fed. 18, 88 C. C. A. 182; *St. Louis L. M. & S. R. Co.* v. *Moore*, 83 Ark. 377, 119 Am. St. Rep. 142, 103 S. W. 1136; *Chastang* v. *Chastang*, 141 Ala. 451, 109 Am. St. Rep. 45, 37 Smith 799.

of the place has constructive possession of it, and in the former case not.

(5) Constructive possession may also depend upon the identity of the thing possessed. The question that most often arises here is, whether the possession of a part of a thing gives constructive possession of the whole, especially where a person occupies a part of a tract of land and the question is how much of the land does he possess. Here, too, there are a multitude of special rules and much conflict among the authorities. In the case of land, the extent of the occupier's possession may depend upon whether he has title or color of title to the part which he does not actually occupy.

A few words may be added as to the rights that are connected with possession. We may distinguish two kinds of rights, which I have elsewhere called permissive and protected rights.[37] A permissive right is a right to do or not to do an act. The act may be called the content of the right. This kind of a right can be exercised, but not violated. A protected right is a right in the existence of a certain state of fact which forms its content. The law seeks to protect for a person the existence of the state of fact by imposing duties upon other persons whose due performance by them will tend to bring into existence or keep unimpaired that state of fact. This kind of right can be violated, but not exercised.

There is a permissive right of possession, jus possidendi. A person may have a right to take or hold the possession of a thing. There is also a protected right of possession, jus possessionis. The law protects for a person his position of power over the thing, which may be impaired by various interferences with it by others, by forbidding such interferences. Ownership includes both of those rights. So do various inferior property rights, such as the rights of tenants for years or bailees; but some valuable property rights, such as easements and some kinds of liens, do not include either of them.

In both of the above-mentioned rights, possession, either the act of taking and holding possession or the state of fact or condition of being in possession, forms what may be called the content of the right. But there is a third right connected with possession, of which possession is not the content but the title, the fact from which the right arises. The possessor of a thing is prima facie presumed to be the owner. This prima facie presumption is good even against

37. See my book, "Leading Principles of Anglo-American Law," Chapter VI; also an article of mine in the Columbia Law Review, May, 1917, on the Arrangement of the Law.

the true owner, who has the burden to rebut it. But as against a person who can not show a better right, the possessor has more than a mere prima facie presumption in his favor. It is commonly said that he is conclusively presumed to be the owner. It seems to me the better way to treat this latter case, as I believe the civilians treat it, not as a case of presumption, but of an actual right; to say that a possessor, as against all persons who have no actual superior right, is deemed to have a right in the thing which resembles ownership. Such a right might appropriately be called a possessory right, as distinguished from a right of possession.

PART VII

INTERNATIONAL LAW

A—PUBLIC INTERNATIONAL LAW

THE INTERCONNECTION OF NATIONALITY AND DOMICILE

By Th. Baty[1]

For generations rival schools of publicists have been disputing the proper criterion of nationality, and the dispute has invariably hinged on the jingle, "race or place." It has been assumed that the fact of birth, and the moment of birth, are decisive, and that one or the other principle must necessarily be adopted. Either *race* must be chosen as the criterion—and then the local sovereign must see an imperium in imperio growing under his very eyes—or else *place* must be chosen, and then the cat's kittens will, as the Irishman said, be "loaves of bread," because they were born in the oven.

Now it seems natural and proper that the children should follow the condition of their parents, and in countries with little or no volume of immigration, there would not be much objection to it. But in countries like those of America, whose population is built up of immigrants, it is impossible for the people to admit that foreigners in their midst transmit their foreign quality indefinitely. And, in fact, it is not probable that the most attached devotees of the doctrine of indelible race pursue their inquiries beyond two or three generations. France and Spain both accept the doctrine; but I doubt whether a person living in Cadiz could be claimed as a Frenchman because his great-grandfather was. At all events, the difficulties of obtaining the necessary evidence become considerable.

The attempt has sometimes been made in South America to cut the gordian knot by dealing with the nationality of the immigrant parents themselves. It has been enacted that persons settled in a country for a certain time, or performing certain acts there, automatically, and even contrary to their desires, acquire its nationality.

1. [D.C.L. (Oxf.), LL.D. (Cambr.); Barrister-at-Law, Inner Temple. He has made numerous contributions to international law. Among his works in this field are "International Law" (London, 1909), and a treatise on conflicts of law under the title "Polarized Law" (London, 1914).—Ed.]

It is not certain whether such an involuntary naturalization would be regarded as "naturalization abroad" by the law of their former state. And it is tolerably certain that it is not bound to recognize it. Peru, for instance, many years ago enacted as an article of the Constitution that any foreigner acquiring real estate in the country became ipso facto naturalized. And so did Mexico, in 1857 and in 1886. It seems that Venezuela at one time provided that everyone even visiting the state thereby became naturalized.[2] It is interesting to remark that a further provision of the Mexican Constitution conferred undesired Mexican nationality on persons who had children born to them in Mexico.[3] Probably no one at the time thought very much of the obligations of nationality. It was probably only the privileges of nationality that were in view. Lieber, the well-known publicist, went so far as to hold officially as an arbitrator that these enforced changes of nationality were inoperative even if an opportunity, unembraced, were afforded the person in question of expressly declining the new nationality. Such a position seems very difficult to sustain. If a foreigner, knowing that the consequence of an act will be naturalization, in the absence of an expression of desire to the contrary, persists in performing the act and remaining silent, it is hard to see that the declared consequence should not follow, unless of course it makes treaty stipulations nugatory. Lieber placed his decision on the ground that since nationality was conceded as a favor in these cases, it must always be open to the party to decline that favor whether he does so in the form and at the time prescribed or not. But that reasoning would deprive the express terms of the law, which require that the dissent shall be intimated forthwith, of all force. Such a nugatory construction runs counter to the first principles of interpretation.

Mr. Olney, the United States Foreign Minister, appears to have admitted in 1895 that the Mexican law was beyond cavil. "It is not within the province or interest of this department to find fault with the laws of Mexico, or to deny the effect attributed to them."[4] But five years earlier, Blaine had objected to the grant by Brazil of citizenship to all persons residing in that state and not intimating a dissent. In this he was joined by France and Italy, and apparently the Brazilian government regarded the grant as a mere municipal grant of privilege having next to no international effect.[5]

2. *Bassett Moore*, "Digest of International Law," III, 303.
3. *Moore*, "Digest," III, 305; *Cogordan*, "Nationalité," 244.
4. For. Rel. U. S. 1895, II, 1008.
5. *Moore*, "Digest," III, 308-9.

According to Cogordan,[6] in Uruguay, in 1829, naturalization was conferred on, or rather incurred by, everyone married to an Uruguayan, or in business in Uruguay, or buying real estate there, or resident there for four years. Venezuela, as late as 1874, imported laborers whom she converted on arrival into subjects, alleging with some finesse the parallel case of persons who married Venezuelans.

I

The problems of double nationality presented by the existence of these rival rules are numerous, dangerous, and insistent. A nation has the right (at any rate by treaty) to see that its subjects have a certain minimum of decent treatment (including exemption from military service) abroad. It has the right to treat them as it likes, itself. If a person is claimed by two nationalities, difficult situations immediately arise, which can perhaps be solved by the exercise of tact in isolated cases, but which may be productive of exceedingly serious consequences, which it ought to be the aim of enlightened juristic science to avoid.

There are those who say—and this gives some color to Westlake's theory that in a case of double nationality neither state can complain of what the other chooses to do to the individual—that Great Britain in so many words disclaimed, through the mouth of the Earl of Malmesbury, in 1858, the right to protect persons born within the realm if they should go to the place of their parents' allegiance. Weiss declares that she did, and so does Cogordan; but it becomes obvious that this is a mistake, if the Report of the Royal Commission on Naturalization (1869) is studied with any attention. And in the recent case of *Malecka*, the Foreign Office successfully induced Russia to refrain from subjecting to the penalties of treason a lady born of Russian parents in England. Although, of course, Russia did not give up the principle for which she contended, she forebore to act upon it—and that is the important point. The United States have also successfully protected persons born in their territory against Costa Rica. That they have not always asserted such protests does not avail. The point is that they have sometimes made them, and have thus kept alive, in conjunction with Great Britain, the ancient rule. It cannot be represented as universally abandoned, so long as such cases occur. What Lords Clarendon and Malmesbury said in their dispatches to the ambas-

6. "Nationalité," I, 242.

sador in Paris in 1857-8 was diametrically the opposite of what Cogordan and Weiss suppose. They declined to assert on behalf of Great Britain any claim to protect as British subjects in foreign countries those children and grandchildren born there of British-born persons as to whom British legislation (exceptionally) applied the rule of race.[7] Thus, they contradicted the very doctrine which they are cited to establish. It is not the fact that they declared that Britain would bend to any foreign rule—what they declared was that she would bend to her own general rule, when its application by a foreign country conflicted with her own exceptions. How Cogordan, brilliant and careful as he was, could have misunderstood this passes all conception.[8]

Can we find a more satisfactory rule to guide us than these conflicting ones?

It will be noticed that both the acknowledged criteria turn on the physical fact of birth. It is either of a certain parent or else in a certain place. Cannot we apply a more spiritual and intellectual test?

Relationship is in reality a mental concept. Of this, the universality of the practice of adoption is a sufficient proof. It is so common and usual for the spiritual relationship to be based upon the physical—in plain language, for the child to be brought up in the family—that we have come to put the easily ascertained physical fact in the forefront of our ideas on the subject. But it is really the basic community of ideas that constitutes a true relationship. Primitive tribes, finding that they regarded each other as friendly, inferred that they must be relations. But we need not imitate their naïveté today. We can separate the moral from the physical element, and, without the necessity of fictions, we can say that the important thing about relationship is its spiritual side—the participation of the child in the consciousness of the family circle into which it comes.

Does the growing child participate, then, in the national milieu of the country to which its parent nominally belongs; or in that of the country in which it is brought up? This is a question the answer

7. It is possible that such persons would be regarded as entitled to protection vis à vis third states. But there is no legal right to such protection, and it is given or withheld at the discretion of the Crown.

8. He says formally (p. 39) that Malmesbury, writing 13 March 1858, "expose nettement que, si l'Angleterre reconnait comme Anglais les enfants nés dans les iles Britanniques de parents étrangers, elle ne prétend nullement les protéger comme tels contre le pays d'où relèvant leurs parents et qui les réclament légalement . . ." Thus is history written! What Malmesbury said was that she did not pretend to protect people born abroad against the country of their birth.

to which will vary, and rightly vary, according as the country of birth is a country of immigration or not. If it is, then the parents are probably absorbed in its culture; if it is not, they are much more likely to retain strong national ties. Would it not, therefore, be a useful criterion to adopt, if we said that the education of the child up to its fourteenth year was decisive? If it has, during that impressionable period, been brought up among schoolfellows of the locality, has learned their language, and played their games, can it be doubted that the country has probably acquired that strong hold on its knowledge and affections which entitle it to its allegiance? If, on the other hand, the parent is not one of a crowd of immigrants, but is living in a detached way, educating his children by a governess or tutor, or sending them to a foreign school, it is probable that the continuance of the old tie may be presumed.

Education, in short, is the keystone of the system proposed. It depends on place, but not on the irrational accident of the place of birth. Much humor has been expended by French writers on the position of a couple, one of them having been transiently born in France, whose child is born when they are also transiently in a Paris hotel in the course of a journey for health or pleasure, and the infant consequently condemned to French military service, though bred in England, and speaking no word of French, and only in France a fortnight. The system above indicated avoids those absurdities.

Whatever view we take of the matter, it is plain that a solution of the question ought to be arrived at without delay. Countries like the Argentine will not and cannot consent that those who have thrown in their lot with them shall find their children aliens to their adopted country. Countries like France, whose subjects are slow to take root abroad, will not and cannot consent that their citizens, temporarily abroad, shall not have French children. But the two points of view are not irreconcilable. If the test of education be thought too subtle and difficult, then surely the test of domicile (in the Anglo-American sense) might well be applied. Settlement of the parents in a country with no fixed or definite intention of ever removing therefrom, would thus operate to give the children the nationality of that place; short of that they would take the nationality of the parents. This would be far from being as ideally just a rule as that which rests on the place of education; but it would be a much clearer and simpler one. The principles of domicile have been well worked out in American, English, and Scots decisions. They

are not appreciated on the continent of Europe, simply because they are not understood. The notion of domicile is invariably confused with that of "domicile," in the French sense, which means little more than residence.

II

Neither of the two existing criteria is without plausible ground. The proposed criterion of education, or if that be impossible, the parents' domicile, combines the valid elements of both.

The criterion of *place* of birth is sometimes stigmatized as an antiquated worship of the soil, and as, in a manner rather idiotic than mystical, subjecting human beings to calcium silicate and fluoride. It is nothing of the kind. It has a thoroughly human and quite intelligible reason. The local sovereign, who has jurisdiction over all that passes on his territory, has the power to regulate births. There is no international ban against his exercising the power for eugenic or hygienic reasons. And it is not an unreasonable contention that the child should owe allegiance to the power which actually was in a position to control its coming into existence. We find it adopted far anterior to, and quite independent of, the rise of feudal ideas. "Whether he be a stranger or born in the land" was the antithesis natural to the Israelite author of Deuteronomy.

The criterion of *race,* perhaps equally reasonable, reposes on the fact that strangers, who do not take the trouble to get naturalized themselves, will probably bring up their children under ordinary circumstances, as subjects of the same allegiance as their own. At times of great national stress, the latter hypothesis will correspond more nearly with the facts than in cosmopolitan eras of easygoing travel. In the old days, where a person was born, there, as a rule, he was bred. In countries of vast immigration, it will never correspond with the facts very closely. It tends to reproduce the conditions of the early middle ages, when the decisive importance attached to race and descent, in determining a person's juridical position, produced a kind of legal hotch-potch, "ce régime bizarre," as Cogordan styles it, which almost inevitably broke up in feudalism. Again, in days of strong étatist government, such as those of the Tudors and our own, the criterion of place will have a certain added weight from the wide and unrestricted powers freely exercised by each government within its local area. So that both criteria are fluctuating, imperfect, and unsatisfactory.

But if international law be a real thing, it must rest on a general

consciousness of what is proper. And it would be a lame conclusion indeed for the orbis terrarum to come to, if it could only decide, as Westlake seems to recommend, that no country can complain of another for treating individuals in a way based on one or other of these criteria. Surely this world has a mind of its own! Surely in the common consciousness of humanity there is some accord as to what (if anything) entitles a state to the supreme sacrifices of life-long devotion.

"Intimate connection with that state during the impressionable years of childhood," is the answer I venture to put forward. Place of birth, race of parentage are both far too rough tests of the connection. Place and character of home and school; education; place of parents' permanent and rooted residence, are criteria which might easily be adopted and which are far more likely to be in correspondence with the facts. The only difficulty will arise in the case of parents who live permanently in a country but are not of it —who sedulously preserve a foreign atmosphere. Except in the East, these cases cannot be common. Perhaps a combination of our tests would meet the difficulty they create. Domicile might be the principal criterion, but education in the country of the parents' nationality, or in schools attended in bulk by foreign pupils, might be admitted to contradict it. But, as an ideal solution, my preference is overwhelmingly for the single test of education. Domicile is not easy to change, and a family thoroughly well incorporated into the society of the place of its immigration, may fail to have a domicile there, through some floating intention of the head to return in specific but remotely possible events: e. g. political changes at home.

Education has so far been recognized as having a direct bearing on nationality only by Russia. It was not, of course, admitted as the sole and sufficient criterion. Its importance was admitted as an exception to the general rule that children follow the nationality of their parents. Birth in Russia would not of itself make an exception in the case of foreign parentage; but birth and education might. This, however, is not really an exception to the general rule, for it was facultative merely. Russian nationality was not forced upon such persons. They were merely recognized as having a municipal right to claim it. The provision, therefore, scarcely amounted to more than an easy means of naturalization. And the converse was not extended to persons born of Russian parents, but born and educated abroad. Nevertheless, it is a most valuable admission of the

importance of the test. Sweden and Holland, though paying no attention to education, attach importance to our alternative criterion of domicile. Indeed, in the case of Sweden, since it is the children's own "domicile" which seems to be regarded, it approaches very nearly to the criterion of education—though it has to be continuous from birth to twenty-one. The importance attached to the matter, is, however, only subordinate, and depends on the attitude of competing nationalities. Nor does it admit the foreign nationality of persons born of Swedes abroad and domiciled where born. The same is true of the Dutch law.

III

The truth is, we need a readjustment of ideas regarding allegiance. So long as the close personal connection between lord and subject subsisted there could be no doubt in the mind of any given person that his devotion was due to the individual within whose jurisdiction, and under whose protection, he was born. But now that allegiance has become in the West a floating sentiment of devotion to an abstract idea, and no longer a definite duty owed to an individual person, the grounds which ought naturally to arouse that sentiment of devotion require to be determined anew. Surely the previous connections of the family ought not in themselves to be sufficient—much less the mere casual place of birth. The sentiment of personal devotion must be aroused by something personal to the individual. In these days that can only be the influences which actually do surround him in early growth. He may, in spite of foreign domicile and education, be brought up at home in a sentiment of strong attachment to the land of his parents' origin. But a general rule must have its exceptions, and it is submitted that a general rule, reasonably fit for adoption so as to correspond with modern feeling, would invest with national liabilities and privileges the individual who is brought up along with natives up to the age of fourteen, in any given country. Let us add that thorough familiarity with the language of a country is almost essential as a preliminary to military service.

The international rule, resting on general conviction, is not susceptible of numerical or detailed exceptions. Most fortunately, international law is not "stretched on the Procrustean bed" of legislative enactment. The consequences of endeavoring to apply Procrustean treatment to it are visible in the humiliating breakdown of the elaborate details embodied in the Conventions of the Hague.

International law is a spirit—to be worshipped in spirit and in truth —the meticulous details of domestic legislation are wholly out of keeping with its nature. They are designed to eliminate the personal equation—and in international law it eliminates itself.

Therefore, it is unnecessary to enter into detailed definitions of what to be "brought up" means. A year's absence in the old country—two or three years' travel in other lands—might not, perhaps, prevent the child from being considered to have been substantially educated in the new country. Personally, I should deprecate even a requirement that the parents should be domiciled in the country of education; it would tend to increase the number of individuals of no nationality. Individuals of no nationality are in practice subject to the liabilities of all nationalities, while invested with the privileges of none.

Lastly, if this principle is really the only one which is rational and just, it must be capable of application independently of agreement. A new rule does not become international law merely because it is better than the old one. The exemption of private property from maritime capture has still its way to make. In the case of nationality, the old rule is admittedly a very bad one:—if it is not simply this, that any nation may treat, as its own subjects, persons born on its soil or descended from its subjects, then it is the ancient rule common to all Europe that the place of birth is decisive. Admittedly, this is a bad rule in the circumstances of the present day. Yet, if, as Hall maintains, a universally accepted rule cannot be changed by individual nations, however numerous, it would seem impossible to deny that a nation is entitled to treat the descendants of persons belonging to other nations born on its soil as its own subjects, and equally entitled to complain of persons born within its territory being treated as the subjects of another. The two cases of maritime capture and of nationality are precisely parallel. The writers who maintain that universally accepted law cannot be altered, except by universal consent, must logically admit that the modern rule of adopting race as the test of nationality has no international validity whatever.

The new rule was adopted in the Code Napoléon, "almost by accident" says Hall citing Delolombe; whilst Cogordan speaks of this part of Napoleon's legislation as "peu logique et assez confuse." No country has adopted it, it seems, without modifications. How can it fairly be said to have displaced the old? How could a state confer upon itself new subjects by its own legislation at the expense of another?

The contest, therefore, lies between the inadequate old rule and the rational one which is here proposed. Is it so rational, so convincingly rational, that it is entitled to be regarded as law as soon as propounded, through the force of its own inherent persuasiveness? Or does it require the formal approval of treaties?

It is not for its author to say. But certainly a rule commending itself by its own outstanding merits exists, if only we could discover it. The present study is meant as a contribution to that end. If we will ask ourselves why an individual should be regarded, by universal consent, as under an obligation to render supreme sacrifice to a given state, we shall probably agree that neither the physical fact of birth there, nor the prior subjection of the parents to it, furnishes us with any reasonable answer. The interests of certainty and coherence require us to accept the old answer until a new one displaces it. And surely it should not need any long search to discover a new answer which no pedantic insistence on the outworn old one will be able to resist. I can see no replication to the plea that, whatever his birth and whoever his parents, a given individual is identified with one particular country by the strongest human ties, those of early intercourse and training.

If the early training is equally divided between two countries, one need not shrink from the consequences that there is no nationality in the particular case—no *necessary* subjection to either state. There is not, in such a case, that absolute and single-minded identification in sentiment with either, which is the only true ground of imposing allegiance. There may be a considerable amount of community of feeling with both, but that is not sufficient. There are advantages in cosmopolitanism, but they are incompatible with nationality.

IV

But even in the case of the parents, why should not domicile (in the Anglo-American sense, "bien entendu") carry nationality with it? Mr. Asser, the late eminent Netherlands authority, has expressed the strong opinion that, for private law purposes, a ten-years' residence might confer nationality. And a ten-years' residence (though he does not seem to think so) is of itself far from being enough to constitute domicile. Domicile, therefore, would be an a fortiori case for acquiring "private law" nationality. And if the adoption of nationality as a criterion of private law has any raison d'être at all, it is that it is reasonable to apply to a person in

private affairs the law to which he is amenable by nationality in public matters. There is no point in creating a separate and distinct "private law nationality"; therefore, unless Asser was a slave of words, and insisted on using the term "nationality" for something which is not nationality at all, he should logically have been willing that ten-years' residence should effect a complete naturalization.

Why should not a person be a subject of that country where he is permanently settled, and from which he has never any intention to depart—the country where his home is? Only, it would seem, because the difficulty of establishing precisely where that place is must in some cases be considerable. But the question of an isolated individual's nationality can never be of any crucial importance to nations. And, if it is important to the individual, he can always make it clear by naturalization. It would be a substantial step in the direction of clarifying the whole relation of states to individuals, if the outworn conception of allegiance were frankly dropped, as an international institution. In that case the correlative duties of sovereign and subject would be put on a plain and intelligible footing—namely, on the obvious fact that the one is dependent on the other for his home, real or potential. The importance of nationality lies in the fact that a state can behave to its own subjects as it likes; i.e. it lies in the duties of nationality. Any state, whatever the law of nations as to naturalization may be, can confer rights and benefits on whomsoever it likes. The great crux of the topic is, on whom may it impose duties?—whom may it treat with unmitigated severity, and force into its armies and ateliers?

The fair answer, it is submitted, is—"Those who are permanently settled in its territory with no definite intention of departing therefrom." The result of accepting that answer would be to eliminate the shadow-battles which rage round the nationality of individuals who never had any real national feeling—battles turning for the most part on worn-out jargon which has no bearing on the facts of life—and, incidentally, to remove the obstacle in the way of a unification of the rules of private international law.

The conception of domicile would doubtless be somewhat modified to suit the case. It is at present somewhat too difficult to change a domicile. Any remote possibility—a sea-sickness proof ship[9]—a revolution in the old country—may prevent the resident from being considered to have his true home where to all intents and purposes it really is. A domicile of origin is difficult to shake

9. *Winans* v *Attorney General*, (English) Law Reports [1906] A. C. 287.

off, and rightly so. But it might be made easier if the party goes to the country of his family's old connection. The artificial domicile ascribed to children ought to be replaced by their real home—the place of their early education, provided that that education is not conducted in an exclusively or substantially foreign atmosphere.

One difficulty may be referred to. Domicile is easily lost *in theory*. Emigration, coupled with intention to remain in a new country is not difficult, and although the intention is practically very difficult to prove, and is certainly not to be conclusively proved by the party's own interested declaration, yet it may be quite evident that in times of stress, the intention to go away, and to stay away, is quite genuine. Is this to operate, in the supposed new system, as a change of nationality? Is the citizen who flies at the approach of danger, and takes up a citizenship elsewhere, to be regarded as henceforth free? The difficulty is more apparent than real. Municipal laws may be directed against such conduct, and if the party comes within the jurisdiction, there is no reason why they should not be enforced, though he is now the subject of another state. Outside the jurisdiction, they could not be enforced at all, in any event.

But perhaps the difficulty points to a certain defect in the definition of domicile. The elements of animus and corpus are not equally balanced. The requirement of animus, we have just seen, is too severe. Something less might serve. The requirement of corpus is too lax. Mere momentary arrival in the new country (in many cases reduced to mere departure for its shores) ought not to be enough. Some substantial ripening of the connection ought to be shown. It not only ought to be the party's intention to stay for good, but that intention ought to have been tested. A year's residence would not be too much to exact. Probably, in the great bulk of cases, time being "the grand ingredient" in estimating changes of domicile, a considerably longer period would in fact elapse. But in the rare case of an unambiguous intention to remain permanently, not only declared but credible and compelling credit, the test of some amount of actual incorporation in the life of the new country seems imposed by common sense. Whether these alterations in the conception of domicile should properly be extended to private law domicile opens up a new question, which it is not our purpose to examine here.

B—PRIVATE INTERNATIONAL LAW

HUBER'S DE CONFLICTU LEGUM[1]

By Ernest G. Lorenzen[2]

Of the vast number of treatises on the Conflict of Laws Huber's "De Conflictu Legum Diversarum in Diversis Imperiis"[3] is the shortest. It covers only five quarto pages; and yet it has had a greater influence upon the development of the Conflict of Laws in England and the United States than any other work. No other foreign work has been so frequently cited. Story himself relied upon Huber more than upon any of the other foreign jurists. Indeed, Lainé[4] goes so far as to say that Story's celebrated work on the "Conflict of Laws" is in reality nothing but a "paraphrase" of Huber.

In the estimation of continental jurists, Huber does not occupy such a prominent position. He is considered one of the lesser writers on the subject. Whence comes this difference in the appreciation of Huber? Before this question is answered it will be

1. "Ulrich Huber was descended from a Swiss family. His grandfather entered the military service of The Netherlands. Ulrich was born at Dokkum in 1636. He studied at the universities of Franeker and Utrecht. In 1657 he became professor of law at the University of Franeker. He was twice offered the chair of law at Leyden, but refused each time. He was afterwards appointed as a member of the Provincial Court at Leeuwaarden, but shortly before his death he returned to Franeker. He died in 1694, or four years before Voet published his Commentary.

"Ulrich Huber was regarded as one of the first rank in the Dutch school of law. His principal works are "De Jure Civitatis"; "Praelectiones Juris Civilis"; "Digressiones Justinianae"; "Eunomia Romana"; and the "Hedendaegse Rechtsgeleertheyt zoo elders als in Frieslandt gebruikelyk." In addition to these works he wrote a considerable number of works on theological and philosophical subjects": *Wessels,* "History of the Roman-Dutch Law," 316-17.

2. [Born April 21, 1876; Ph.B., Cornell, 1898, LL.B. 1899; studied at École de Droit, École libre des Sciences Politiques, Paris, and at Heidelberg and Göttingen; J. U. D. "maxima cum laude," Göttingen, 1901; practiced law at New York, 1901-3; professor of law, University of Maine, 1903-4; professor of law, 1904-11, dean 1910-11, George Washington University; professor of law, University of Wisconsin, 1911-14; professor of law, University of Minnesota, 1914-17; now professor of law at Yale University. He is a member of many American and foreign learned societies and committees; and is author of numerous writings, especially in the fields of conflict of laws and comparative law. His articles have appeared in many of the important American and European law reviews.—Ed.]

3. It constitutes a part of title 3, part 2, book 1, of *Huber's* "Praelectionum juris civilis, tomi tres."

4. Clunet, Journal du droit international privé, XXIII, 486.

profitable to set forth very briefly Huber's views on the subject of the Conflict of Laws and to compare them with the views of the other leading statutists.

I

Huber has formulated his views concerning the legal basis upon which, in his opinion, the rules of the Conflict of Laws rest in the following three maxims:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.

2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

Maxims one and two announce the doctrine that all laws are territorial, that they have no force and effect ex proprio vigore beyond the limits of the enacting state, but bind all found within the territory. In thus proclaiming in such unqualified terms the territoriality of all laws Huber went beyond any of his predecessors. The writers belonging to the Italian school[5] wrote at a time when feudalism was losing its foothold in the respective countries in which they wrote, and the modern doctrine of territorial sovereignty had not yet developed. The questions did not relate to the conflicting laws of independent states. In Italy they arose between the various local city laws and the Roman law which governed throughout the peninsula as a general common law. In France they arose between the different provincial "customs" of one and the same state. To limit the operation of laws to the confines of the state or province in which they had originated appeared, under such conditions, to be both unnatural and unnecessary. Following the tradition of the old Germanic law, some laws were deemed to fol-

5. "The Italian doctrine consisted at first in the sketches, gradually gaining in clearness and certainty, of Durant, Belleperche, Cinus, and Fabre. It was thereupon enlarged, developed and complicated through the writings of Bartolus, and later enriched through additions from Baldus and Salicet. During the entire fifteenth century and a part of the sixteenth, in the hands of Paul de Castre, Alexander, Rochus Curtius in Italy, and Masuer, Chasseneuz, and Tiraqueau in France, it remained stationary. Dumoulin, at last, gave to it new life and a new impetus when d'Argentré arrested the movement and replaced it with a new theory": *Lainé*, "Introduction au Droit international privé," I, 250-51.

low the person wherever he went; whereas others were regarded as having merely a local effect. Neither the Italian writers, nor the French writers belonging to the Italian school, attempted, however, to define with precision which of the statutes would have extra-territorial effect and which would not.[6]

In Brittany, feudalism had maintained itself more strongly than in any other of the French provinces. Inspired by these feudal ideas, d'Argentré contended that "all customs are real," that is, territorial. In one respect, however, this courageous Britton yielded to the traditional view. The rule that the status and capacity of a person has extra-territorial effect had become so thoroughly established in France through the influence of the Italian school, that d'Argentré accepted the same as an exception to his general theory; but he attempted to confine it within narrow limits.[7]

The new doctrine formulated by d'Argentré did not fall upon a receptive ground in France, and for a century and more it was not accepted there. Feudalism was disappearing and there was no inclination to emphasize the differences in the laws of the various provinces.

In Holland conditions were different. The Dutch provinces had just gained their independence and formed a federation. But this federation affected but little the independence of the individual provinces in which there existed an intense jealousy of their local rights. This condition coupled with the fact that a growing commerce with foreign nations caused them to look upon the Conflict of Laws as arising between separate political sovereignties, led them to accept most readily d'Argentré's doctrine of the territoriality of all customs. A new school of jurists arose, represented by Paul Voet, Huber, and John Voet, which carried d'Argentré's doctrine to its logical conclusion. It declined to recognize any exception to the rule that laws have ipso jure no extra-territorial operation. According to these writers all extra-territorial effect of laws rested solely upon comity. Paul Voet was the first to lay down his new doctrine, without developing it. He did not even present it as something new, and supported his statement that all laws are territorial by reference to the older writers.[8] His son, John Voet, on the contrary, was fully aware of the fact that the views set forth involved

6. *Lainé*, "Introduction au droit international privé," I, 248 et seq.

7. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 2, 3, 9, 11. See discussion of status and capacity, infra.

8. *P. Voet*, "De Statutis," s. 4, c. 2, n. 7.

a radical departure from those expressed by d'Argentré, whose views he vigorously assailed.[9] Twenty years before the publication of John Voet's great work on the Pandects, in which the latter's treatment of the Conflict of Laws is found, Huber had announced the doctrine of the Dutch school in the clearest and most unmistakable language, and had made it the foundation of his treatise on the subject under discussion.

Comity. Huber's third maxim indicates that the "sovereign" of a state may "by way of comity" recognize rights acquired under the laws of another state. Huber was the first writer who made it clear beyond a doubt, that the recognition in each state of so-called foreign created rights was a mere concession which such state made on grounds of convenience and utility, and not as the result of a binding obligation or duty. From the wording of the maxim it would appear that Huber conceived of comity as a *political* concession which might be granted or withheld arbitrarily by the sovereign. He adds, however, that the solution of the problem is to be derived "not exclusively from the civil law but from convenience and the tacit consent of nations."[10] What convenience and the tacit consent of nations might prescribe was evidently a question for the courts, and so the term "comity" came soon to be understood as *judicial* comity.[11]

Public Policy. In his third maxim the limits beyond which the recognition of foreign laws cannot go are also stated. In Huber's words they can be recognized only "so far as they do not cause prejudice to the power or rights of such government or of their subjects."[12] In other places he adds that such recognition will be denied if it would be revolting to accord it,[13] or if there has been an evasion of the local law.[14]

Application of Huber's Maxims

Status and Capacity in General. With reference to status and capacity the greatest difference of opinion has existed among the different writers. Those belonging to the Italian school applied the law of the domicile. They gave to such law extra-territorial opera-

9. *J. Voet,* "Ad Pandectas," bk. 1, tit. 4, pt. 2, n. 5, 7.
10. *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 2.
11. *Catellani,* "Il diritto internazionale privato e i suoi recenti progressi," II, 455-56.
12. See also *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 11, 12.
13. Ibid., n. 8 (in case of incestuous marriages).
14. Ibid., n. 8, 13.

tion, but they did not do so uniformly nor in accordance with fixed principles.[15] D'Argentré regarded these matters as belonging to the personal statute which he admitted, by way of exception to his general doctrine, to have extra-territorial effect ex proprio vigore. In order to restrict the scope of this exception he held, however, that a statute was personal only if (1) it affected the person in a general and not merely in some special manner, and (2) it did not affect immovable property directly or indirectly.[16] According to Paul Voet laws relating to status or capacity were not operative ipso jure in another state.[17] He recognizes that on grounds of comity extra-territorial effect might be given to the personal statute, but he mentions only the case of a prodigal placed under guardianship, and holds that the incapacity thereby imposed would be recognized even with respect to immovable property in another state.[18] John Voet set forth the theory of the Dutch school more fully than any other writer, and forcefully argued in favor of the proposition that the laws governing status and capacity, like any other laws, could have by reason of their own inherent force no extra-territorial operation.[19] To what extent exceptions might be recognized on grounds of comity is discussed by him in connection with the different topics. He felt unable to lay down any general rules in this regard.[20]

Huber is generally very lucid in his statements, but in the matter of status and capacity it is difficult to get his exact meaning. He says that from the general maxims stated the following maxim may also be derived:[21]

> "Personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect, that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place."

The illustrations given in the same section would seem to indicate that a person who has become of age according to the lex domicilii will have capacity everywhere to bind himself and even to transfer immovable property situated elsewhere, and that a person placed under guardianship by the law of his domicile will not be bound by contracts entered into in another state. From the two

15. *Lainé*, "Introduction au droit international privé," I, 259-62; *Catellani*, "Il diritto internazionale privato," I, 332-340.
16. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.
17. *P. Voet*, "De statutis," s. 4, c. 2, n. 6, 7.
18. *P. Voet*, "De statutis," s. 4, c. 3, n. 17.
19. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 5 et seq.
20. *J. Voet*, Ibid., n. 16.
21. *Huber*, "Praelect.," pt. 2, bk. 1; tit. 3, n. 12.

sections that follow it is clear, however, that such is not Huber's meaning. He there distinguishes between status and capacity and subjects the latter to the lex loci actus.[22]

Capacity to Dispose of Immovable Property. The writers belonging to the Italian school applied the lex domicilii.[23] Those following d'Argentré disagreed with respect to the question whether a statute affecting capacity to dispose of immovable property should be regarded as a real statute. D'Argentré himself was of this opinion;[24] but some of the later writers, giving a more restricted meaning to the term "real statute," held that the laws governing capacity to convey immovable property inter vivos, or by will, belonged to the class of personal statutes and were subject, therefore, to the lex domicilii.[25] Others made various distinctions.[26] All would admit that if the law of the situs prohibited a transfer of the property such prohibition was binding everywhere.

Of the writers belonging to the Dutch school Paul[27] and John[28] Voet held that the law of the situs would determine the capacity of a person to dispose of immovable property. Huber does not express himself clearly on the point. He states that the lex loci actus "does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals

22. Lainé assumes that Huber in giving the illustrations mentioned in paragraph 12 must have had in mind some conditions which he does not express. Such conditions may have been, according to Lainé, that the judges called upon to apply the foreign law had authority to confirm the "venia aetatis" or the interdiction, or to declare the party of age in accordance with local law: *Lainé,* "Introduction au droit international privé," II, 185.

23. *Catellani,* "Il diritto internazionale privato," I, 485-86.

24. *D'Argentré,* "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 7, 8.

25. *Hert,* "Opera," I, "de collisione legum," s. 4, n. 8.

26. Rodenburg and Boullenois accepted the doctrine that the lex domicilii governed with respect to transfers inter vivos. (*Rodenburg,* "Tractatus de jure conjugum," tit. 2, c. 1; *Boullenois,* "Traité de la personnalité et de la réalité des loix," ed. 1766, I, 77 et seq.; 127 et seq.; 705 et seq.; "Dissertations sur des questions qui naissent de la contrariété des loix et des coutumes," ed. 1732, 2-4.) As regards wills Rodenburg applied the lex rei sitae ("Tractatus, de jure conjugum," tit. 2, c. 5, n. 7). Boullenois distinguished whether the capacity to make a will affected the person or immovables. In the former case the lex domicilii would govern; in the latter case, the law of the situs (*Boullenois,* "Traité de la personnalité," I, 718, ed. 1766).

27. *P. Voet,* "De statutis," s. 9, c. 1, n. 4; s. 4, c. 2, n. 6; s. 4, c. 3, n. 12.

28. *J. Voet,* "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 8.

may provide to the contrary."[29] From his subsequent observations it is doubtful whether in Huber's opinion the majority of a party to convey immovable property, or his general capacity to dispose of such property, should be governed by the lex rei sitae, or whether on grounds of comity the lex loci actus or the lex domicilii should control. The statement quoted may refer only to special mandatory provisions of the law of the situs.[30]

Capacity to Make a Will Disposing of Movable Property. The capacity of a testator to dispose of movable property by will has been determined invariably by the lex domicilii of the testator at the time of his death.[31] Huber does not express himself on the subject.

Form. Under the influence of Bartolus, the jurists of the Italian school came, on grounds of practical convenience, to recognize the rule that a legal act executed in the form prescribed by the law of the place of execution should be regarded as valid everywhere. At first this rule was an optional one, it being permissible to comply as regards formal execution with the law governing the validity of the transaction in general. Whether in the opinion of these writers the rule locus regit actum, as it was subsequently called, assumed in the course of time a mandatory character is uncertain.[32] D'Argentré's doctrine of the territorial character of all law should have caused him logically to apply the lex rei sitae to the transfer of immovable property. But he passed the question over in silence, and his successors retained the traditional rule and applied it especially with respect to wills.[33] The rule locus regit actum was at first optional in France, but it became obligatory in the end.[34] An express prohibition of the law of the situs would, of course, prevail.[35] The Belgian jurists were the first to accept the

29. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

30. The view that the lex rei sitae should determine the capacity to transfer immovable property inter vivos and by will became also the prevailing view in Germany in the sixteenth and seventeenth centuries: *Wächter*, "Archiv für die civilistische Praxis," XXIV, 275.

31. *J. Voet*, "Ad pandectas," bk. 28, tit. 3, n. 12.

32. *Lainé*, "Introduction au droit international privé," II, 399-400.

33. *Lainé*, "Introduction au droit international privé," II, 359; *Bouhier*, "Observations sur la coutume du duché de Bourgogne": "Oeuvres," I, 766, c. 28, n. 10, ed. 1787; *Froland*, "Mémoire concernans la nature et la qualité des statuts," I, 136, ed. 1729.

According to Boullenois, if the formalities prescribed relate to proof and authenticity the lex loci actus applies, but if they are attached to things the law of the situs governs: *Boullenois*, I, obs. 21, p. 426; obs. 23, p. 456; *Boullenois*, II, obs. 46, rule 4, p. 467, ed. 1766.

34. *Lainé*, "Introduction au droit international privé," II, 400-405.

35. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," c. 28, n. 10; "Oeuvres," I, 766, ed. 1787.

logical conclusion to which d'Argentré's doctrine led, and under their influence the Edict of Albert and Isabella, of 1611, was enacted, Art. 13 of which prescribed that the formalities of wills relating to land should be governed by the law of the situs.[36] The inconvenience of this rule began, however, to be felt very soon. Juristic opinion reverted in favor of the lex loci actus and found expression in an official interpretation, as it was called, of the Edict by the Privy Council of the Belgian Provinces, rendered in 1634, which amounted in fact to a repeal of the above provision. It held that a will relating to foreign immovables might be validly executed in Belgium in the form prescribed by Belgian law.[37]

The writers of the Dutch school entertained different views on the subject. Paul Voet recognized the rule locus regit actum, even as regards transactions affecting immovable property. A will disposing of such property was void, according to him, if it did not satisfy, as regards form, the lex loci actus.[38] He allowed, however, certain exceptions to the mandatory character of the rule, the principal one of which was that a contract or a will which was not executed in the form prescribed by the law of the place of execution should be sustained at the domicile of such party if it complied with the formal requirements of the lex domicilii.[39] Huber applied his second maxim, that all parties are to be deemed subjects of the place where they happen to be, to matters of form and concluded therefrom that the lex loci actus was binding absolutely. He recognized no exception and held the rule applicable to movable and immovable property alike.[40] According to him a will by a Dutch

36. Art. 13 of the Edict reads as follows: "Si es lieux de résidence des Testateurs, et de la situation de leurs Biens, y a diversité de Coutumes pour le regard de ces dispositions de dernière volonté; Nous ordonnons qu'en tant que touche la qualité desdits Biens, si on en peut disposer, en quel âge, et avec quelle forme et solennité, on suivra les Coutumes et usances de la dite situation." Nouveau commentaire sur l'Édit Perpetuel, du 12 juillet, 1611 (Lille, 1770), p. 79.

Burgundus and Christinaeus approved this view: *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 6, n. 2, 3; *Christinaeus*, "Practicarum quaestionum decisiones," IV, dec. 5, n. 5.

37. *Lainé*, "Introduction au droit international privé," II, 362.

38. *P. Voet*, "De statutis," s. 9, c. 2, n. 1, 3.

39. Ibid., n. 9, exc. 4. A will executed in the forms prescribed by the lex loci actus would not be sustained at the domicile, however, if the testator had gone to such place for the purpose of evading the lex domicilii. Ibid., n. 4.

40. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 4, 8.

"Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitae. . . . licet enim hic subjectus revera maneat patriae suae, tamen illud, ut supra diximus, de actu primo est intelligendum, quoad actum vero secundum subditus illius loci sit temporarius, ubi agit vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur": *Hert*, "Opera," I, "de collisione legum," s. 4, n. 10, p. 179, ed. 1716.

subject disposing of property in Holland, executed in Frisia in the form prescribed by the Dutch law, was therefore invalid.[41] John Voet, on the other hand, would sustain a will disposing of movable property if it conformed, as regards formal execution, either to the lex loci actus or to the lex domicilii and a will disposing of immovable property if it satisfied the lex loci actus or the lex rei sitae.[42]

Immovable Property. The question to what extent the capacity of a person to convey immovable property and the formal requirements of instruments disposing of such property are controlled by the law of the situs has been discussed already. As regards substantive validity it should be noted that, ever since d'Argentré, laws affecting immovables as such formed the principal class of real statutes and were governed by the lex rei sitae.[43] Great differences of opinion existed, however, in the application of the rule.[44] All agreed that an express prohibition imposed by the law of the situs should be respected everywhere.[45] Huber applies to immovables the law of the situs "when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated."[46]

Movable Property. From the earliest time in the Conflict of Laws movables were deemed subject to the law of the domicile of their owner, a rule which was expressed by the Latin maxims "mobilia ossibus inhaerent" and "mobilia personam sequuntur." These maxims were employed as a rule with reference to questions of succession and to the property of married persons, that is, with reference to questions affecting a person's property as a whole. Scarcely an instance can be found where the rule was actually

41. *Huber,* Ibid., n. 4.

42. *J. Voet,* "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 15.
The rule that a legal act was valid, as regards formal requirements, if it satisfied the law of the place of execution, was established also in Germany in the course of the sixteenth century: *Wächter,* Archiv für die civilistische Praxis, XXIV, 276.

43. There is little on the subject in the works of the writers belonging to the Italian school (*Lainé,* "Introduction au droit international privé," I, 258-59; *Catellani,* "Il diritto internazionale privato," I, 346-49). Bartolus inquires by what law the question whether a person has the right to raise a house higher is to be governed and he answers it by referring the question to the law of the situs: *Bartolus,* "In primam codicis partem commentaria," English translation by Professor Beale under the title of "Bartolus on the Conflict of Laws," n. 27.

44. *Lainé,* "Introduction au droit international privé," I, 328 et seq., 342 et seq., 395 et seq., 408 et seq., 413 et seq.

45. *Rodenburg,* "Tractatus de jure conjugum," tit. 2, c. 5, n. 1-6.

46. *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

applied to the transfer of a particular article. The older writers stated the rule governing movables in general terms without distinguishing between the cases where a person's property as a whole was affected or the transfer related to a particular article.[47] Some followed d'Argentré's[48] view and held that movable property was attached to the person of the owner, being adherent to his person, as it were, and was governed, therefore, by the law governing his person. Others agreed with Dumoulin,[49] and regarded the question as falling within the real statute and subject, therefore, to the law of the situs, but by a legal fiction regarded such property to be at the domicile of the owner. Of the writers of the Dutch school Paul[50] and John[51] Voet accepted Dumoulin's view. Huber recognized the general rule in the distribution of movable property upon death but dismisses the subject by a mere reference to John à Sande.[52] The latter accepted d'Argentré's explanation.[53]

Contracts. The writers of the Italian school applied the law of the place where the contract was made to the determination of the natural consequences of a contract, that is, to the consequences which inhere in the contract from its inception, and the law of the place of performance, to the consequences which arise subsequently to the formation of the contract as the result of negligence or default. If no place of performance was specified the negligence or default was deemed to occur at the forum.[54] Dumoulin did not distinguish between the direct and indirect consequences of a contract but advanced the view that the intention of the parties should govern. If such intention was not expressed it was to be derived from the attendant circumstances.[55]

47. *Bar,* "Private International Law" (Guthrie's translation), 488-90.

48. *D'Argentré,* "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30.

49. *Dumoulin,* "Coutumes générales du haut et bas pays d'Auvergne," II, art. 41; "Opera," II, 747, col. 1, ed. 1681.

50. *P. Voet,* "De statutis," s. 4, c. 2, n. 2, 8; s. 9, c. 1, n. 8.

51. *J. Voet,* "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 11.

52. *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

53. *John à Sande,* "Opera juridica omnia," "Dec. Fris.," bk. 4, tit. 8, def. 7, p. 194, ed. 1697.

54. *Lainé,* "Introduction au droit international privé," I, 135-36; *Bartolus* (Beale's translation), n. 15, 16, 18. Bartolus applies the same rules to a contract to sell immovable property: ibid., n. 16.

55. *Lainé,* "Introduction au droit international privé," I, 255-56.

"Aut statutum loquitur de his, quae meritum scilicet causae vel decisionem concernunt, et tunc aut in his, quae pendent a voluntate partium, vel per eas immutari possunt et tunc inspiciuntur circumstantiae, voluntatis, quarum una est Statutum loci, in quo contrahitur; et domicilii contrahentium antiqui vel recentis, et similes circumstantiae": *Dumoulin,* "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus;" "Opera," III, 554, ed. 1681.

The principle that the will of the parties, expressed or implied, was the controlling consideration was accepted also by the Dutch writers. In conformity with this view a contract might have extra-territorial operation and affect immovable property in another state.[56] Mandatory provisions of the situs would, of course, prevail.[57] Nor could effect be given to the expressed or implied intention of the parties if it ran counter to prohibitory statutes of the forum or its laws establishing a public policy.[58] Huber appears to accept these views. He holds, however, relying on the Roman maxim "contraxisse unusquisque in eo loco intellegitur, in quo ut solveret, se obligavit" that where the place of performance differs from the law of the place where the contract was entered into, the parties will be deemed to have contracted with reference to the law of the place of performance.[59]

Marriage. According to the early writers capacity to marry was governed by the general rule applicable to capacity. On grounds of policy and because of the influence of the church, whose co-operation was necessary in the celebration of a marriage, it seems, however, that the lex loci celebrationis had a greater influence than in connection with ordinary contracts.[60]

As regards the ceremony required to constitute a valid marriage the rule locus regit actum was recognized.[61] Whether a marriage could validly be entered into by observing the formalities prescribed by the law of the domicile of the parties is not certain. The question cannot have arisen frequently in practice as even in Protestant countries it was the universal custom to celebrate a religious marriage, which in the nature of things conformed to the lex loci celebrationis.[62] The jurists who explained the rule locus regit actum on the theory of a voluntary submission to the local law

56. *P. Voet,* "De statutis," s. 4, c. 2, n. 15. Cf. s. 9, c. 1, n. 2; *J. Voet,* "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 19.

57. *J. Voet,* "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 20.

58. Ibid., n. 18. For illustrations see also *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 11.

59. *Huber,* "Praelect," pt. 2, bk. 1, tit. 3, n. 10.

60. *Catellani,* "Il diritto internazionale privato," I, 478-79.

Boullenois expresses himself concerning the old French law as follows: ". . . le mariage étant du droit civil de chaque nation, par rapport aux formalités et aux conditions que la loi de chaque Pays exige, il est bon et valable dans tout autre, dès qu'il a été une fois valablement contracté dans un Pays": *Boullenois,* "Traité de la personnalité et de la réalité des loix," I, c. 3, obs. 23, p. 495, ed. 1766.

61. *P. Voet,* "De statutis," s. 9, c. 2, n. 9; *J. Voet,* "Ad pandectas," bk. 23, tit. 2, n. 4.

62. *Friedberg,* "Das Recht der Eheschliessung in seiner geschichtlichen Entwickelung," 295-96. See also *Varnier,* "Droit français du mariage au point de vue du droit international privé," Paris, 1891, pp. 84 et seq.

naturally assumed that the rule had a mandatory character.[63] This was also no doubt Huber's view.[64]

Various exceptions were laid down with reference to the application of the lex loci celebrationis. A marriage celebrated in accordance with the law of the place of celebration might not be recognized at the domicile of the parties if it was entered into in the face of a prohibitory statute there existing,[65] or in evasion of the law of the domicile,[66] or if it was deemed to conflict in other respects with the law of the forum. According to Huber such marriage will not be recognized if it prejudices others, if it is incestuous or if it was entered into in evasion of the law of the domicile.[67]

Effect of Marriage Upon Property. In the absence of a marriage settlement the writers of the Italian school applied the personal law of the husband.[68] D'Argentré regarded the statutes relating to the effect of marriage upon the property of the spouses as real statutes, and held in consequence that the law of the domicile could not affect property situated in another province or country.[69] Dumoulin, on the contrary, maintained that the parties must be deemed to have submitted, by way of tacit agreement, to the lex domicilii.[70] Most of the later writers on the Conflict of Laws have accepted Dumoulin's theory of a tacit contract and the law of matrimonial domicile as the governing law.[71] Some writers, notably Boullenois, rejected the notion of a tacit contract, but desired that a single law should govern the property rights of spouses. They contended that the laws relating to the effect of marriage upon the property rights of husband and wife belonged to the status of

63. *Hert*, "Opera," I: "de collisione legum," s. 4, n. 10.

64. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 8.

65. *J. Voet*, "Ad pandectas," bk. 23, tit. 2, n. 4.

66. Ibid., bk. 1, tit. 4, pt. 2, n. 14; *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, obs. 31, p. 427, ed. 1766; *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 28, n. 60-62, "Oeuvres," I, 773-74, ed. 1787.

67. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 8.

68. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 19.

69. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 28-33.

70. *Dumoulin*, "Consilium," 53, n. 3, "Opera," II, 964, ed. 1681.

71. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, "Oeuvres," I, 714, ed. 1787; 1 *Hert*, "Opera": "de collisione legum," s. 4, n. 44, 46, 47, 49. *Pothier*, "Traité de la communauté, principes préliminaires," n. 15. The latter states expressly that if the husband at the time of the marriage had the intention to acquire a new domicile he will be deemed to have submitted to the law of the new domicile.

The above became also the prevailing view in Germany towards the end of the seventeenth century. *Wächter*, Archiv für die civilistische Praxis, XXV, 48. Concerning the writers following d'Argentré's view, see *Hert*, "Opera," I, "de collisione legum," s. 4, n. 46.

marriage and were governed, therefore, by the personal law of the parties, that is, the law of their domicile.[72] Writers rejecting the contract theory and basing the application of the lex domicilii upon the direct operation of the law governing the status of the parties were logically forced to hold upon a change of domicile, that the law of the new domicile must determine the rights of the parties in future acquisitions of property, but it seems that this conclusion was not uniformly reached.[73] All agreed that express prohibitions or other mandatory provisions of the law of the situs were binding everywhere.[74]

The Dutch writers entertained conflicting views. Paul Voet states that the matter is governed by the law of matrimonial domicile, by which is meant the law of the actual domicile of the husband at the time of marriage, or, if he intended at that time to establish a new domicile, the law of the intended domicile.[75] He says also that a subsequent change in the domicile will not affect the applicatory law.[76] At the same time he holds that the laws concerning the effect of marriage upon the property of the spouses are real and have no operation with respect to foreign property.[77] Story's ex-

72. "Je ne sais si, pour échapper à tous les cris de M. d'Argentré contre Me. Charles du Molin, il n'eût pas été plus court et plus convenable, sans recourir à la présomption d'une convention et d'une soumission, dont il ne paroit aucune trace, de regarder les statuts de la communauté et de la non-communauté, comme des Loix qui affectent les conjoints d'un état et d'une condition pure personnelle": *Boullenois*, "Traité de la personnalité et de la réalité des loix," II, obs. 28, pp. 299-300, ed. 1766.

73. See *Boullenois*, "Traité de la personnalité et de la réalité des loix," II, obs. 38.

74. *Bouhier*, "Observations sur la coutume du duché de Bourgogne," I, c. 26, n. 3, 21, "Oeuvres," I, 714, 716, ed. 1787.

75. *P. Voet*, "De statutis," s. 9, c. 2, n. 5.

76. Ibid., s. 9, c. 2, n. 7, where he says: "Quid si maritus alio domicilium postmodum transtulerit, eritne conveniendus, secundum loci statutum, in quem postremum sese recepit? Non equidem. Quia non eo ipso, quod domicilium transferat, censetur voluntatem circa pacta nuptialia mutasse. . . . Nisi eadem solemnitas in actu contrario intercesserit. . . . Accedit, quod illa pacta solus mutare nequeat maritus; id quod tamen posset, si per emigrationem in alium locum, ea mutarentur."

77. He says: "Verum quid statuendum de variarum Provinciarum in Belgio consuetudine, vel potius statuto, quo inter conjuges post celebratas nuptias, ut in Hollandia; post copulam, ut apud Ultrajectinos, bonorum inducitur communio, nisi pactis sit exclusa dotalibus, reali ne statuto adnumerabitur, an potius personali? Resp. Et si forte de jure civili tale statutum, ad exemplum societatis ad bona alibi jacentia sese extenderet, in qua societate, si ea sit omnium bonorum, etiam omnia continuo, perfectam aliquam traditionem, exceptis nominibus, communicabantur. . . .

"Etiam si pactum interveniat, ex eo nasceretur actio personalis, ad bonorum extra territorium jacentium, ubi contraria consuetudo locum habet communicationem, vel aestimationem. . . . Quia tamen illa communio statutaria potissimum rerum spectat alienationem, adeoque res ipsas afficit primario et principaliter, negari non poterit, quin reali statuto, hoc nostrum sit

planation of the various passages is that according to Voet all such contracts, whether express or tacit, are real and not personal laws, and therefore do not directly affect property out of the territory, "but only indirectly, by a remedy to enforce the contract against extra-territorial property."[78]

John Voet, strong advocate as he was of the doctrine that all laws are territorial, and holding in that respect widely different views from Dumoulin, on grounds of expediency accepted the latter's theory of a tacit contract. Indeed, he contributed much in establishing the doctrine by showing in a most ingenious and forceful manner that the effect of marriage upon the property rights of the spouses results from the will of the parties.[79]

Huber rejected the theory of tacit contract, for he states expressly that upon a change of domicile the former law will not control the rights of the parties in property that is subsequently acquired.[80] In other respects he accepts the view that the rights of the parties with reference to all property, immovable as well as movable, should be controlled by one law, the law of matrimonial domicile.[81]

Marriage Settlements. The validity of marriage settlements, so far as it depends upon capacity or form, is governed by the rules stated above. With respect to substantive validity the law of matrimonial domicile has been held generally to govern, subject to mandatory provisions of the law of the situs of immovables.[82]

Intestate Succession. The writers of the Italian school did not work out any consistent theory on this subject. Influenced by the doctrine of universal succession of the Roman law some applied the law of the domicile of the decedent to all property. Many held,

---

connumerandum; ut ad bona alibi sita, ubi contrarium obtinet statutum, reales effectus non exerat . . .": P. Voet, "Ad statutis," s. 4, c. 3, n. 9.

78. *Story,* "Conflict of Laws," 8th ed., 254, note 4.

79. *J. Voet,* "Ad pandectas," bk. 23, tit. 2, n. 85.

80. *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 9.

81. Ibid., n. 10.

82. *Huber,* "Praelect., pt. 2, bk. 1, tit. 3, n. 10; *Catellani,* "Il diritto internazionale privato," I, 356, 481.

Bartolus had already contended that marriage settlements should be governed by the law of the husband's domicile. After stating that the lex loci contractus governs matters which arise out of the contract itself at the time it is made, he adds: (n. 17) "This doctrine does not apply in the case of dowry, for a reason stated in the text" (*Bartolus* on the "Conflict of Laws," Beale's translation, p. 19). The passage referred to is Digest, V, 1, 65, which reads as follows: "Exigere dotem mulier debet illic, ubi maritus domicilium habuit, non ubi instrumentum dotale conscriptum est; nec enim id genus contractus est, ut et eum locum spectari oporteat, in quo instrumentum dotis factum est, quam eum, in cujus domicilium et ipsa mulier per condicionem matrimonii erat reditura."

however, that the laws governing intestate succession were real. According to Bartolus a distinction must be made. If the statute of the situs of immovable property is real it would govern absolutely. If it was personal, it would not apply to the estate of a foreigner.[83] All were agreed that the law of the domicile of the decedent would determine the distribution of movables. In France and Germany laws of succession were regarded from the beginning as real.[84] D'Argentré proclaimed vigorously the same doctrine. As regards immovables the law of the situs therefore applied.[85] Movables, however, were considered as adhering to the person or as being situated at his domicile and were controlled, consequently, by the law of the decedent's domicile.[86] The above became the general doctrine in the seventeenth century in France, Belgium, Holland, and Germany.[87] The Dutch jurists Paul[88] and John[89] Voet and Huber[90] accepted this view. The doctrine that the succession to the whole estate of the decedent should be governed by one law arose only at a later date.[91]

Wills. The rules governing capacity and form have been stated above. The substantive validity of wills relating to movables was governed by the domicile of the testator at the time of death.[92] Wills relating to immovables were subject to the law of the situs.[93] These views were shared also by the Dutch writers, including Huber.[94] The latter does not mention the rule governing

83. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 42; *Lainé*, "Introduction au droit international privé," II, 289-290.

84. *Lainé*, "Introduction au droit international privé," II, 284.

85. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 9, 10, 23, 24.

86. "Sed alia ratio est de personarum jure in quo et moblia continentur, quia talia non alio jure habentur quam persona ipsa, et ideo legem ab domicilii loco capiunt": *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 3.

87. *Lainé*, "Introduction au droit international privé," II, 294 et seq.

88. *P. Voet*, "De statutis," s. 4, c. 3, n. 10; s. 9, c. 1, n. 3, 8.

89. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 3, 11, 21; bk. 38, tit. 18, n. 34 (movables).

90. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

91. In Germany theory and practice broke away from the old law in the eighteenth century. The new doctrine supported the application of the law of the domicile of the decedent at the time of his death to immovable and movable property alike. The principal grounds upon which this doctrine was justified were: 1, that the estate represents the person of the deceased and should be governed therefore by his personal law; 2, that the law of inheritance is a succession in universum jus, which must be subject to one law: See *Wächter*, Archiv für die civilistische Praxis, XXV, 195-98.

92. *D'Argentré*, "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 30; *J. Voet*, "Ad pandectas," bk. 28, tit. 3, n. 12.

93. *Dumoulin*, "In codicem Justiniani," I, 1, "conclusiones de statutis aut consuetudinibus localibus," "Opera," III, 556, ed. 1681.

94. *P. Voet*, "De statutis," s. 9, c. 1, n. 4, 8; *J. Voet*, "Ad pandectas," bk. 28, tit. 1, n. 44; *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 15.

the interpretation of wills. In this regard the writers generally referred to the domicile of the testator at the time of the execution of the will, even with respect to wills disposing of immovables.[95]

Procedure. Since Bartolus, it has been recognized that matters relating to procedure were subject to the law of the forum.[96] Great differences of opinion have existed, however, with respect to the matters falling within the term "procedure." This has been true especially concerning the statute of limitations or prescription of actions. Bartolus regarded the question as going to the substance. In the matter of contracts he applied the law of the place of performance.[97] The later writers followed Bartolus in regarding the question of the prescription of actions as affecting the substantive rights of the parties instead of the remedy merely. In its application to contracts some applied the law of the place of contracting; others, the law of the place of performance.[98] Paul Voet broke with the traditional view on the subject by holding that the prescription of actions is a matter of remedy and subject to the law of the forum.[99] Huber took the same view.[100] Neither of these authors advanced any reasons for rejecting the old view. John Voet, who accepted the same doctrine, appears to justify it on the ground that the forum will be generally the domicile of the debtor.[101] The prescription of actions affecting immovables was held by all to be subject to the lex rei sitae.[102]

International Jurisdiction in Civil Matters. Following in the footsteps of the Roman law, the continental countries have never taken the view adopted by the Anglo-American courts that a personal action may be brought in any country in which the defendant may be served with process. They have required always that the defendant shall either be domiciled in the place where the action is brought, or own property there, or that the transaction shall have some connection with the law of that place.[103] Where the jurisdic-

95. *J. Voet*, "Ad pandectas," bk. 28, tit. 5, n. 16; *Hert*, "Opera," I: "de collisione legum," s. 6, n. 3, p. 222, ed. 1716.

96. *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 15.

97. Ibid., n. 19.

98. *Michel*, "La prescription libératoire en droit international privé," 29 et seq.

99. *P. Voet*, "De statutis," s. 10, n. 1.

100. *Huber*, "Praelect.," pt. 2, bk. 1, tit. 3, n. 7.

101. *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12.

102. *Dumoulin*, "Opera," III, 557, ed. 1681; *J. Voet*, "Ad pandectas," bk. 44, tit. 3, n. 12; *Boullenois*, "Traité de la personnalité et de la réalité des loix," I, obs. 20, p. 350, ed. 1766.

103. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., §§ 40-41; *Bar*, "Private International Law" (Guthrie's translation), 908 et seq.

The French doctrine that the courts have, on principle, no jurisdiction in

tion was based upon the forum contractus the Roman law required in addition that the defendant be served with process within the jurisdiction or that he possess property in such jurisdiction.[104] In modern times it has been contended, however, that inasmuch as the requirement of personal service in the above case resulted in Roman law from the fact that it knew nothing of citation by writing, this condition should be recognized no longer today when a citation by writing may be served upon the defendant in another state.[105] Even the writers belonging to the Dutch school, who extended the doctrine of the territoriality of all laws beyond the earlier writers, did not go so far as the Anglo-American courts, so as to base jurisdiction in personal actions upon service alone. In consonance with the principles of the Roman law,[106] which he followed, Huber held that all actions might be brought at the domicile of the defendant.[107] Actions in rem might be brought, according to Huber, also at the situs of the property,[108] and actions arising out of contracts, at the place where such contracts were to be fulfilled,[109] or, in exceptional cases, where they had been entered into.[110]

Foreign Judgments. The subject of res judicata and the enforcement of foreign judgments has become greatly complicated

---

personal actions with respect to suits between foreigners is of modern origin. It did not exist in the old law: 8 Denisart, "Collection de décisions nouvelles, Étranger, § V, n. 1; 5 *Weiss*, "Traité de droit international privé," 2d ed., 55.

Concerning the old French law see in general, *Boullenois*, "Traité de la personnalité et de la réalité des loix," obs. 25.

104. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509, citing Digest, V, 1, 19, § 1, pr.; XIII, 4, 1; *Bar*, "Private International Law" (Guthrie's translation), 921.

105. *Wetzell*, "System des ordentlichen Civilprozesses," 3d ed., § 41, p. 509.

106. "Juris ordinem converti postulas ut non actor rei forum, sed reus actoris sequatur; nam ubi domicilium res habet vel tempore contractus habuit, licet hoc postea transtulerit, ibi tantum eum conveniri oportet": Code, III, 13, 2.

"Actor rei forum, sive in rem sive in personam sit actio, sequitur. Sed et in locis, in quibus res, propter quas contenditur, constitutae sunt, iubemus in rem actionem adversus possidentem moveri": Code, III, 19, 3.

"Venire bona ibi oportet, ubi quisque defendi debet, id est, ubi domicilium habet, aut ubi quisque contraxerit. Contractum autem non utique eo loco intellegitur, quo negotium gestum sit, sed quo solvenda est pecunia": Digest, XXXXII, 5, 1-3. Cf. Digest, V, 1, 19, and discussion of subject by *Bar*, "Private International Law" (Guthrie's translation), 917-19, note 64.

107. *Huber*, "Praelect.," pt. 2, bk. 5, tit. 1, n. 49.

108. Ibid., n. 48. Huber applied this doctrine both to movables and immovables. John Voet, on the other hand, held that as regards actions in rem affecting immovables the jurisdiction of the situs was exclusive: *J. Voet*, "Ad pandectas," bk. 5, tit. 1, n. 77.

109. *Huber*, "Praelect.," pt. 2, bk. 5, tit. 1, n. 53, 54.

110. Ibid., n. 55. In accordance with the provisions of the Roman law Huber required with respect to contracts the additional condition that the defendant be served within the jurisdiction or own property therein: n. 54.

in modern times in consequence of the development of territorial sovereignty. During the Middle Ages, when the Roman law was regarded on the continent as the jus commune of all civilized countries, the recognition and enforcement of foreign judgments rendered by courts of competent jurisdiction appeared a natural duty imposed by considerations of justice. The jurists applied to this subject the same rules which were deemed controlling in the determination of the question whether a law had only territorial or also extra-territorial operation. Foreign judgments in personam were generally given effect everywhere in accordance with the Roman maxim "res judicata pro veritate accipitur."[111] Baldus,[112] D'Argentré,[113] John Voet,[114] and Hertius[115] held this view, which Huber[116] likewise followed. According to the Dutch writers such recognition and enforcement rested, however, upon comity and would be declined when the interests of the forum or of its subjects would be impaired thereby.[117] The courts of the situs were regarded as having exclusive jurisdiction with respect to actions in rem affecting immovables.[118] Such judgments were not recognized or enforced, therefore, unless rendered by a court of the situs.[119]

Some of the French writers took views differing from the above.[120]

Criminal Law. The doctrine that criminal laws are exclusively territorial is a modern doctrine and was not established as yet when Huber wrote. Bartolus and Baldus had developed a considerable number of rules concerning the law of crimes in its international aspects. One of these was that if a citizen was prosecuted for a crime which he had committed abroad his guilt and punishment should be determined in accordance with the lex loci delicti.[121] The leading French writers on the subject of the Conflict of Laws during the sixteenth century, D'Argentré and Dumoulin, paid little

111. Digest, I, 5, 25.
112. *Baldus,* "In primum, secundum et tertium codicis librum commentaria," bk. 1, tit. "de sum. Trinitate," n. 93.
113. *D'Argentré,* "Commentarii in patrias britonum leges," art. 218, glosse 6, n. 47.
114. *J. Voet,* "Ad pandectas," bk. 42, tit. 1, n. 41.
115. *Hert,* "Opera," I: "de collisione legum," s. 4, n. 73.
116. *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 6.
117. *P. Voet,* "De statutis," s. 4, n. 14; *Huber,* "Praelect.," pt. 2, bk. 1, tit. 3, n. 3, 6.
118. *Hert,* "Opera," I, "de collisione legum," s. 4, n. 73.
119. *J. Voet,* "Ad pandectas," bk. 42, tit. 1, n. 41.
120. See *Boullenois,* "Traité de la personnalité et de la réalité des loix," I, obs. 25.
121. See *Bartolus* on the "Conflict of Laws" (Beale's translation), n. 44-49; *Meili,* "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 37-45.

attention to the subject. In the seventeenth century and at the beginning of the eighteenth the French practice went very far in the application of the law of the forum to crimes committed abroad.[122] The Dutch jurists entertained various views. Burgundus held that, in the absence of an express statutory provision to that effect, the criminal laws of the forum would not apply to crimes committed by subjects abroad.[123] He was also of the opinion that if the state into which a criminal had fled was asked to prosecute him, as might happen under exceptional circumstances in view of the fact that extradition was not granted, it could do so only in accordance with the lex loci delicti.[124] Confiscations of property pronounced in criminal courts were deemed to have no application to property in other states.[125] Paul Voet maintained that a criminal might be prosecuted according to the law of the forum with respect to crimes committed in another state.[126] Foreign sentences confiscating property were held by him to be effective everywhere as regards movables but not as regards immovables.[127] Huber likewise holds that the state in which a criminal is apprehended may prosecute him for a crime committed abroad, for whoever is found within a territory is, according to him, subject to its criminal jurisdiction.[128] He appears, however, to have reference solely to the question of jurisdiction and would recognize no doubt the application of the lex loci delicti to all substantive matters. With respect to the recognition and enforcement of foreign judgments Huber would make no distinction between judgments in civil and criminal matters. Both should be enforced, on grounds of comity, for reasons of utility and convenience, unless it would cause prejudice to the state or to its citizens.[129]

II

From the foregoing presentation it may be readily inferred why the English courts, when toward the end of the eighteenth century the first cases involving a conflict of laws presented themselves for decision, should have accepted the doctrine of the Dutch school in

122. *Meili*, "Lehrbuch des internationalen Strafrechts und Strafprozessrechts," 49.
123. *Burgundus*, "Tractatus controversiarum ad consuetudines Flandriae," tract. 5, n. 5, 6.
124. Ibid., n. 9, 10. "In delictis rationem loci habemus in quo sunt commissa": Ibid., n. 2.
125. Ibid., tract. 3, n. 13.
126. *P. Voet*, "De statutis," s. 11, c. 1, n. 5.
127. Ibid., s. 11, c. 2, n. 3, 4.
128. *Huber*, "De jure civitatis," bk. 3, s. 4, c. 1, n. 41-42.
129. Ibid., n. 42.

preference to the views entertained by the writers of the Italian and French schools. According to Meili,[130] the reception of the doctrine of the Dutch school in England was materially assisted by the fact that William III was at the same time king of England and stadtholder of Holland and that the English and especially the Scotch students of the law were in the habit of completing their legal education in Holland. The real reason for such reception lay, however, much deeper. Had the English lawyers and judges been equally familiar with the writings of the Italian, French, and German writers they would unquestionably have accepted the theory advanced by the Voets and Huber, for these writers were the first to announce in the most unqualified manner the doctrine that all laws are territorial in their nature and can operate within the domain of another state only so far as the latter, on grounds of comity, consents to such operation. This viewpoint alone was acceptable to the Common Law of England which, owing to the strong influence of feudalism, possessed a most pronounced territorial character. This explains also why, of the Dutch writers, Huber's treatise should have been cited and relied upon most. Paul Voet, it is true, had expressed before the fundamental views advanced by Huber, and from a theoretical viewpoint the doctrines of the Dutch school were developed most by John Voet, whom Lainé[131] calls on that account the real founder of the Dutch school. John Voet was no doubt the greatest of the three. Indeed, so great was his influence upon the Dutch law that he is said to occupy a position similar to that which Pothier occupies with respect to French law. Although Huber did not originate the doctrines of the Dutch school, nor develop them, he stated the fundamental position of this school more lucidly and concisely than did either of the other two writers. The three axioms mentioned by Huber at the very outset of his treatise and which are the corner-stones of his entire discussion, express the viewpoint of the Dutch school in the boldest and most categorical manner. Story gives to these maxims his unqualified assent.[132]

The practical tone of Huber's treatise, which is illustrated by cases which the writer recollected from his experience as judge of the Frisian court, its brevity and simplicity, appealed to the English and American judges. The author contents himself with a brief statement of the principal rules and their application, without

130. *Meili*, "International civil and commercial law" (Kuhn's translation), 83-84.
131. *Lainé*, "Introduction au droit international privé," II, 388.
132. *Story*, "Conflict of Laws," 8th ed., 31.

dwelling upon the many controversial points which obscure the writings of other writers.

Huber rejects the classification of statutes into personal, real and mixed—a classification adopted by Paul and John Voet—and proposes to solve all problems upon the basis of the axioms mentioned. The above division seems nevertheless to underlie his discussion of the subject. Although he states so nowhere expressly, and in some respects leaves the matter in doubt, he admits that all questions affecting immovable property directly, excepting matters of form, are subject to the lex rei sitae. He recognizes also, at least as regards status, that the personal statute will be given extra-territorial effect on grounds of comity.

Even if the correctness of the general maxims laid down by Huber is admitted as the fundamental basis upon which the Conflict of Laws must rest, much doubt may be experienced in their application to individual problems. Huber's own deductions are at times quite uncertain and in other instances quite arbitrary. For example, if the principle of temporary subjection, which Huber adopts as his second maxim, is sound, it should logically apply to all questions of capacity, and yet Huber's statements with respect to this important matter are obscure and it is very questionable to what extent they harmonize with the above axiom. If a person is subject to the law of the place in which he acts, whence does Huber derive the rule that the intention of the parties controls the obligation of contracts? If matters affecting immovables directly are to be excepted from the operation of the lex loci actus and to be submitted to the lex rei sitae—a proposition which is nowhere clearly stated by Huber—why should not the formal execution of instruments disposing of such property be subject logically to the law of the situs? And yet Huber applies the rule locus regit actum. How can the rule that the transfer of movables is governed by the lex domicilii be reconciled with the general maxims? Surely the conclusions stated by Huber cannot be derived all by mere logic from the maxims announced. It must not be forgotten, however, that Huber's object was to write a practical treatise which should state the existing law. Had he amplified his statements he would have admitted, without question, that some of the rules laid down by him could not be derived from his general principles but had found general recognition on grounds of convenience.

The Belgian jurist, Albéric Rolin, speaking of Huber, says:[133]

133. *Rolin*, "Principes du droit international privé," I, 79.

"His doctrine, however, is badly reasoned and little scientific. It is summed up in several axioms, stated quite arbitrarily, from which the author draws his deductions. We place above him immeasurably the jurist we have just mentioned, John Voet, whose influence upon the law of his country seems to us to have been more considerable."

We may contrast with this the following estimate from the pen of Professor Harrison. He says:[134]

"But there is a special point in regard to which Ulrich Huber differs from the other civil jurists. All these writers, though they possess much good sense, learning, and practical wisdom, strove to distinguish between personal and real statutes. That was, as has been stated, an absolutely futile inquiry, which was devoid of all reality. If Ulrich Huber's treatise rests on the same basis, it furnishes nevertheless something in addition. Huber's treatise "de conflictu legum" is only a short essay, forming part of his introduction to the civil law, and is contained within five quarto pages. . . . They are characterized by clearness, practical judgment and an entire absence of pedantry. The rules laid down within those five pages are satisfactory and exact. The matter is not exhausted, it is true, and the maxims are very general. But, at the same time, they establish the bases of Private International Law and deal with the subject in conformity with our modern ideas.

"In the seventeenth century Private International Law was in the hands of the Dutch; in the following it belonged to the French. But the latter have added nothing to the general principles of the science. It must suffice to cite the names of D'Aguesseau, Bouhier, Froland, and Boullenois, who lived in the first half of the eighteenth century, in the great period which preceded the era of the French revolution. Their works contain ingenious remarks with respect to special cases; but none of these authors succeeded in adding a single scientific principle to Huber's three famous rules, and all accepted the old useless method which attempted to classify the statutes instead of analyzing the legal relations."

Concerning the influence of the Dutch school upon the development of the Conflict of Laws, Meili's words probably express the general verdict among the modern continental jurists.[135] He says:[136]

"It has been said for a time that the Dutch writers opened the way for the development of Private International Law—les jurisconsultes des Pays-Bas ont frayés la route—as Foelix has asserted.[137] The Dutch school has in fact put the Conflict of Laws out of joint and has placed the whole subject on a basis where it nearly perished. At all events it

134. Clunet, Journal du droit international privé, VII, 428.

135. Some take a less radical view. See *Catellani*, "Il diritto internazionale privato," I, 454 et seq. One of the late French writers on the Conflict of Laws defends the theory of the Dutch writers: *Vareilles-Sommières*, "La synthèse du droit international privé," I, 8, 78-97.

136. *Meili*, in Niemeyer's Zeitschrift für internationales Privat- und Strafrecht, VIII, 190.

137. *Foelix*, "Traité du droit international privé," I, 4th ed., 15.

blocked the way to its future development. Retrogression and not progress resulted from this school. Every day we still feel the reflex effect of this erroneous doctrine. The Dutch writers prepared a juridical blind alley for our subject in the form of *comitas*. This is the truth and all else is fiction."

"Comity," says another writer,[138]

"is a pretext for the evasion of the consequences of a strict territorial law. After the notion of such law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscure and little defined concept, interest, courtesy, and reciprocity, ideas so important for the history of law, play a part. . . . The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of courtesy and reciprocity a system of reprisal, instead of a furtherance of juridical relations."

The Anglo-American view is stated nowhere better than in the following words of Story:[139]

"It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy as a matter of paramount moral duty. Now assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity, and charity. Every nation must be the final judge for itself, not only of the nature and the extent of the duty, but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretense to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust. . . .

"The true foundation on which the administration of international law must rest is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return. . . .

"There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one

138. *Bustamante*, "Tratado de derecho internacional privado," I, 456.
139. *Story*, "Conflict of Laws," 8th ed., 32, 33, 35.

nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is inadmissible when it is contrary to its known policy or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their government, unless they are repugnant to its policy or prejudicial to its interests. It is not comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided."

Such a difference in the appreciation of the Dutch school, and of Huber in particular, as appears from the quotations above given, must be due to a difference in the fundamental conception concerning the nature and legal basis of the subject of Private International Law. This is indeed the true explanation. The word "comity" on the continent stands opposed to "justice." It was in this sense that the Dutch writers probably used it. Huber does not say so in so many words but John Voet does. He says that foreign laws are admitted "ex comitate . . . . liberaliter et officiose . . . . nullo alioquin ad id jure obstricto."[140] Although Huber was not the originator of the theory of comity he was nevertheless the first to give prominence to the idea through his maxims, and became thus in large measure responsible for its popularization. The notion of justice and comity are, however, not necessarily disassociated.

"Once the tacit existence of comity is admitted," says Catellani,[141]

"it can be derived only from custom and the decisions of courts, and in the one case as well as in the other it becomes an effect and manifestation of the popular conscience whose constant direction indicates to the judges what they ought to regard as the tacit will of the state. Comity in this sense, and so modified in its original meaning, becomes an element which may be rendered a more and more perfect vehicle for the development of Private International Law. In each age it will reflect the consciousness, rooted more and more firmly in the popular conscience, of what corresponds to the common advantage of all the states and all mankind. And when this conscience becomes later conscious also of the existing solidarity between the states and the international rights of individuals, both will find in the notion of comity the same sanction through the tacit will of the state."

It was in this juridical sense that the term comity came to be actually understood. Says Westlake:[142]

140. *J. Voet*, "Ad pandectas," bk. 1, tit. 4, pt. 2, n. 1.
141. *Catellani*, "Il diritto internazionale privato," I, 454-55.
142. *Westlake*, "Private International Law," 5th ed., 22-23.

"While English writers and judges freely borrowed the term 'comity' from John Voet and Huber, it may be doubted whether they meant it strictly in a sense independent of justice. Although on the continent comity and justice are usually regarded as forming an antithesis, it is probable that in this country the prevailing view has been that while a concession is made in not determining every question by the lex fori, that concession is dictated not only by a convenience amounting to necessity, but also by deference to a science of law embodying justice, which the law of the land was deemed to have adopted as governing its own interpretation and application, and from which it was conceived that the rules of comity were drawn."

Huber was a positivist who stated fearlessly what he believed to be the actual law. He saw that the recognition and enforcement of foreign law depended upon the assent of the state called upon to recognize or enforce the alleged right. A foreign law could have no effect ipso jure outside the territory of the enacting state. It must be recognized or accepted, that is incorporated, by the law of the forum. This is Huber's doctrine in essence. This is also the standpoint of the Anglo-American law and of the continental courts. The foreign doctrinal writers are not satisfied, however, with this conception of the Conflict of Laws.[143] Their aim is to plant the science of Private International Law upon a foundation more stable than that of comity. No uniformity can ever be attained, according to them, if each state is free to adopt those rules of the Conflict of Laws which appear to it most convenient and useful. They seek to derive the rules of the Conflict of Laws, therefore, from a source that shall be superior to the internal law of each state, and this source they conceive to be International Law. Instead of being a part of the internal law of each state, the rules of the Conflict of Laws constitute, in their opinion, a universal system which imposes its rules upon the individual states from without. According to this conception, the rules of the Conflict of Laws are in reality rules defining the jurisdiction of the different states, the limits of each being determined by International Law. As the positive International Law of today has developed very few principles relating to our subject,[144] each jurist

143. See *Pillet*, "Principes de droit international privé," Paris and Grenoble, 1903; *Zitelmann*, "Internationales Privatrecht," Leipzig, Vol. 1 (2d ed.), 1912, Vol. 2 (1st ed.), 1903.

144. "Pillet believes in a compulsive force of universal law, exercised alike on Sovereigns and private individuals, or perhaps through Sovereigns on private individuals. Neither the comity theorists nor Dicey believe in it. I believe in it, but I think it is very easy to exaggerate its content. Phillimore's views are very much mine, and I respectfully refer to them ("International Law," IV, §§ 4, 5). In more recent days, those of Professor Kahn ("Natur und Methode des internationalen Privatrechts"), cited by Pillet, approach very nearly to the same thesis": *Baty*, "Polarized Law," 168.

must needs be guided in the formulation of the fundamental principles by his own sense of justice, and assume, as it were, the rôle of an international legislator.

The continental jurists recognize that in certain matters affecting its social and economic interests each state must be free to exclude the operation of foreign law within its territory. The rules governing in this regard are called rules of "public order." Concerning the meaning and application of these rules there is hopeless disagreement. If the conclusions reached in individual instances are similar to, or identical with, those obtained upon the basis of the doctrines of the Dutch school, the fundamental difference in the scientific viewpoint of the internationalists and the positivists must not be overlooked. The continental jurists are theorists who believe that the harmonious development of the science of Private International Law can be promoted best through the elaboration of an ideal legal system, without reference to the existing law. The Anglo-American lawyers and judges, on the other hand, are positivists, who understand by the term "law" rules which are recognized and enforced by courts of justice. They find it difficult to see how good can result from a discussion of principles which exist only in the mind of the particular writer.

That these discussions have not resulted in a communis opinio doctorum, which might have a beneficial effect upon the development of the Conflict of Laws, is known to all acquainted with the continental literature on the subject. It is difficult to find a subject with reference to which there is so much disagreement. Solid progress can be made only if the juristic discussions keep in touch with actual life and positive law. A uniform system of the Conflict of Laws that shall have force in the different countries will never exist as long as there are independent states. All that is humanly attainable is a greater uniformity than that now existing. Before much can be accomplished in this direction there must exist a better understanding of foreign legal systems, and a greater degree of trust and confidence in such systems. As long as each country feels at heart that its own law is the best in the world, and that justice can be secured only in accordance with its rules, there is little hope of any real progress. As the solidarity of nations comes more into evidence and the justice of enforcing foreign laws under given circumstances becomes more apparent, the different systems will gradually tend towards greater uniformity. During this process the fundamental conceptions concerning the Conflict of Laws entertained by Huber, though imperfectly developed by him, will

constitute a secure foundation. Instead of having almost destroyed the science of Private International Law, as Meili has asserted, the Dutch jurists were the first to have any real conception of such a science. Huber's axioms must, in the nature of things, govern our subject until the complete sovereignty of the individual states is lost and a common superior has been established.

As long as there remains between the Anglo-American and continental writers such a wide difference in their conception of "law" and the science of law, there will naturally remain also the same wide difference of opinion in their estimation of Ulrich Huber and of the Dutch school in general.

APPENDIX

DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS[1]	OF THE CONFLICT OF DIVERSE LAWS IN DIVERSE GOVERNMENTS
1. *Origo et usus hujus Quaesiti, forensis quidem, at juris Gentium magis quam civilis.*	1. Origin and use of this question, forensic indeed, but belonging to international rather than to civil law.
2. *Regulae fundamentales hujus doctrinae.*	2. The fundamental rules of the subject.
3. *Acta inter vivos et mortis causa valent ubique secundum jus loci, quo celebrantur.*	3. Acts inter vivos and mortis causa are valid everywhere according to the law of the place where they are done.
4. *Quod exemplo declaratur, testamenti.*	4. Its application to wills.
5. *Contractus.*	5. Its application to contracts.
6. *Rei Judicatae.*	6. Its application to res judicata.
7. *Actionis instituendae.*	7. Its application to the bringing of actions.
8. *Matrimonii.*	8. Its application to marriage.
9. *Extendi hoc etiam ad effectus earum rerum, etiam quod ad immobilia.*	9. The extension of the rule to the effect of the above transactions and even with respect to immovables.
10. *Limitatio regulae de loco.*	10. Limitation of the rule of the place.
11. *Alia limitatio ejusque ampliatio.*	11. Another limitation and its amplification.
12. *Regula de qualitatibus personalibus certo loco impressis,*	12. The rule that personal qualities impressed by a certain

1. The text follows the second edition of *Huber's* "Praelectionum Juris civilis tomi tres," Leipzig, 1707, a copy of which may be found in the library of the Harvard Law School. The splendid collection of works on the Conflict of Laws contained in this library has been placed generously at the disposal of the writer.

ubique vim habentibus.

13. *Scilicet, qualem ejusmodi personae jure cujusque loci habent: ut exemplis declaratur.*

14. *In jure immobilium spectari jus loci, quo sita sunt.*

15. *Declaratur exemplis Testamenti, Contractuum et Successionis ab intestato.*

1. Saepe fit, ut negotia in uno loco contracta usum effectumque in diversi(s) locis imperii habeant, aut alibi dijudicanda sint. Notum est porro, leges et statuta singulorum populorum multis partibus discrepare, posteaquam dissipatis imperii Romani provinciis, divisus est orbis Christianus in populos ferme innumeros, sibi mutuo non subjectos, nec ejusdem ordinis imperandi parendique consortes. In jure Romano non est mirum nihil hac de re exstare, cum populi Rom. per omnes orbis partes diffusum et aequabili jure gubernatum Imperium, conflictui diversarum Legum non aeque potuerit esse subjectum. Regulae tamen fundamentales, secundum quas hujus rei judicium regi debet, ex ipso jure Rom. videntur esse petendae; quanquam ipsa quaestio magis ad jus Gentium quam ad jus Civile pertineat, quatenus quid diversi populi inter se servare debeant, ad juris Gentium rationes pertinere manifestum est. Nos ad detegendam hujus intricatissimae quaestionis subtilitatem, tria, collocabimus axiomata,

place have force everywhere.

13. It is manifest to what sort of limitation such persons are subject according to the law of each place, as will be shown by examples.

14. As regards immovables the law of the situs must be consulted.

15. This is shown by examples from the law of wills, contracts, and intestate succession.

1. It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations. For the purpose of solving the subtlety of this most intricate question, we shall lay down three maxims which being conceded as they should be

quae concessa, sicut omnino concedenda videntur, viam nobis ad reliqua planam redditura videntur.

2. Sunt autem hae: I. *Leges cujusque imperii vim habent intra terminos ejusdem reip. omnesque ei subjectos obligant, nec ultra, per l. ult. ff. de Jurisdict.* II. *Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur, per l. 7, s 10. in fin. de interd. et releg.* III. *Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur. Ex quo* liquet, hanc rem non ex simplici jure Civili, sed ex commodis et tacito populorum consensu esse petendam: quia sicut leges alterius populi apud alium directe valere non possunt, ita commerciis et usu gentium promiscuo nihil foret magis incommodum, quam si res jure certi loci validae, mox alibi diversitate Juris infirmarentur, quae est ratio tertii axiomatis: quod, uti nec prius, nullum videtur habere dubium. De secundo videntur aliqui secus arbitrari, quando peregrinos legibus loci, in quibus agunt, teneri negant. Quod in quibusdam casibus esse verum fatemur et videbimus *infra*: sed hanc positionem, *pro subjectis imperio habendos omnes, qui infra fines ejusdem agunt,* cer-

everywhere will smooth our way for the solution of the remaining questions.

2. They are these:

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond (Digest, 2, 1, 20).

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof (Digest, 48, 22, 7, §10, i.f.).

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

It follows, therefore, that the solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law. And that is the reason for the third maxim concerning which hitherto no doubt appears to have been entertained. As for the second maxim, some persons seem to be of a different opinion and to deny that foreigners are subject to the law of the place in which they act. I consider this to be true in certain cases, as we shall see below. But the proposition that all within the boundaries of a government are to be deemed subjects

tissimam esse, cum natura Reipubl. et mos subigendi imperio cunctos in civitate repertos, tum id, quod de arresto personali apud omnes fere gentes receptum est, arguit. Grotius *2. c. 11. n. 5.* Qui in loco aliquo contrahit tanquam subditus temporarius legibus loci subjicitur. Nec enim ulla ratione freti sunt, qui peregrinos, sine alia causa, quam quod ibi reperiuntur, *Arresto* medio, illic juri sistere se cogunt, quam quod imperium in omnes, qui intra fines suos reperiuntur, sibi competere intelligunt.

3. Inde fluit haec Positio: *Cuncta negotia et acta tam in judicio quam extra judicium, seu mortis causa sive inter vivos, secundum jus certi loci rite celebrata valent, etiam ubi diversa juris observatio viget, ac ubi sic inita, quemadmodum facta sunt, non valerent.* E contra, negotia et acta certo loco contra leges ejus loci celebrata, cum sint ab initio invalida, nusquam valere possunt; idque non modo respectu hominum, qui in loco contractus habent domicilium, sed et illorum, *qui ad tempus ibidem commorantur.* Sub hac tamen exceptione; si rectores alterius populi exinde notabili incommodo afficerentur, ut hi talibus actis atque negotiis usum effectumque dare non teneantur, secundum tertii axiomatis limitationem. Digna res est, quae exemplis declaretur.

thereof is nevertheless perfectly correct, for it is in conformity not only with the nature of a state and the custom of subjecting all found therein to its sovereignty, but also with the doctrine accepted by almost all nations concerning personal arrest. Grotius, 2, c. 11, n. 5, says that he who contracts in any particular place subjects himself as a temporary subject to the laws of such place. For the doctrine that foreigners are compelled to submit to mesne arrest, for no other reason than that they are found in a place, can be justified only on the ground that the sovereignty is deemed to extend over all found within the territory.

3. From the above the following principle is derived; all transactions and acts, in court as well as out, whether mortis causa or inter vivos, rightly done according to the law of any particular place, are valid even where a different law prevails, and where, had they been so done, they would not have been valid. On the other hand, transactions and acts done in violation of the law of that place, since they are invalid from the beginning, cannot be valid anywhere; and this is true not only as regards persons having their domicile in the place of the contract, but also as regards those who are there for the time being. With this exception, nevertheless, if the sovereigns of another nation should be affected thereby with a serious inconvenience they would not be bound to give force and effect to such acts and transactions, according to the restriction laid down in the third maxim. The matter is important enough to be illustrated by examples.

4. In *Hollandia* testamentum fieri potest coram notario et duobus testibus, in *Frisia* non valet, nisi septem testibus corfirmatum. Batavus fecit testamentum more loci in Hollandia, ex quo bona, quae sita sunt in Frisia, illic petuntur. Quaeritur, an judices Frisii secundum illud testamentum vindicias dare debeant. Leges Hollandiae non possunt obligare Frisios, ideoque per axioma *primum* testamentum illud in Frisia non valeret, sed per axioma *tertium* valor ejus sustinetur et secundum illud jus dicitur. Sed Frisius proficiscitur in Hollandiam, ibique facit testamentum more loci contra jus Frisicum, redit in Frisiam ibique diem obit, valetne testamentum? valebit, per axioma *secundum*, quia dum fuit in Hollandia, licet ad tempus, jure loci tenebatur, actusque ab initio validus ubique valere debet, per axioma *tertium*, idque sine discrimine mobilium et immobilium bonorum, ut juris est ac observatur. Frisius e contra facit in patria testamentum coram Notario cum duobus testibus, profertur in Hollandia, ibique bona sita petuntur, non fiet adjudicatio, quia testamentum inde ab initio fuit nullum, utpote factum contra jus loci. Quin idem juris erit, si Batavus heic in Frisia tale testamentum condat, etsi in Hollandia factum valeret; verum enim est, quod heic ita factum ab initio

4. In Holland a will can be made before a notary and two witnesses. In Frisia it is not valid unless attested by seven witnesses. A Dutch subject made a will in Holland, in accordance with the custom of the place, by virtue of which property situated in Frisia is demanded in that place. The question is whether the judges of Frisia should allow him to vindicate the property in accordance with such will. The laws of Holland cannot bind the Frisians; therefore, according to the first maxim, such will would not be valid in Frisia, but by the third maxim its validity would be supported, and by that the will is sustained. But suppose that a Frisian goes to Holland, where he makes a will in conformity with the law of the place but contrary to Frisian law, and returns to Frisia, where he dies. Is the will valid? It is valid according to the second maxim, because while he was in Holland, although only temporarily, he was bound by the law of the place; and an act, valid from the beginning, should be valid everywhere, in accordance with the third maxim, without distinction between movable and immovable property, and such is the actual law. A Frisian, on the other hand, makes in his own country a will before a notary and two witnesses. It is carried into Holland, and a demand is made of the things found there. Recovery is denied because the will was invalid from the beginning, having been made contrary to the law of the place. And the same thing would be true if a Dutch subject should make such a will in Frisia, although it would have been valid if made in Holland; for a will made here in this manner would

fuerit nullum, per ea, quae *modo* dicta fuerunt.

5. Quod de testamentis habuimus, locum etiam habet in *actibus inter vivos;* proinde contractus celebrati secundum jus loci, in quo contrahuntur, ubique tam in jure quam extra judicium, etiam ubi hoc modo celebrati non valerent, sustinentur; idque non tantum de forma, sed etiam de materia contractus affirmandum est. *Ex. gr.* In certo loco merces quaedam prohibitae sunt; si vendantur ibi, contractus est nullus: verum si merx eadem alibi sit vendita, ubi non erat interdicta, et ex eo contractu agatur in locis, ubi interdictum viget, emptor condemnabitur; quia contractus inde ab initio validus fuit. Verum si merces venditae, in altero loco, ubi prohibitae sunt, essent tradendae, jam non fieret condemnatio; quia repugnaret hoc juri et commodo Reip. quae merces prohibuit, secundum limitationem axiomatis tertii. Ex adverso, si clam fuerint venditae merces, in loco, ubi prohibitae sunt, emptio venditio non valet ab initio nec parit actionem, quocunque loco instituatur, utique ad traditionem urgendam: nam si traditione facta, pretium solvere nollet emptor, non tam e contractu quam re obligaretur, quatenus cum alterius damno locupletior fieri vellet.

be void from the beginning for the reasons just stated.

5. What we have said about wills applies also to acts inter vivos. Contracts made in accordance with the law of the place where they are entered into will therefore be supported everywhere, in court as well as out, even in those places where contracts entered into in such manner would not be valid. And this may be affirmed not only with respect to the form of the contract but also as regards its substance. For example: In a certain place particular kinds of merchandise are forbidden to be sold. If they are sold in such a place the contract is void. But if the same merchandise were sold in some other place, where it is not prohibited, and suit is brought on the contract where the prohibition exists, the purchaser will be held because the contract was valid from the beginning. If the goods are to be delivered, however, in a place where they are prohibited, no recovery can be had because it would be repugnant to the law and interests of the state prohibiting the sale of such goods, according to the restriction contained in the third maxim. On the other hand, if the merchandise should be sold secretly, in the place where such sale is prohibited, the sale would not be valid from the beginning and no action will lie no matter where it may be brought, not even to compel the delivery; for if the purchaser should refuse to pay the price after delivery he would be bound not so much by virtue of the agreement as by the delivery of the thing, in so far as he would enrich himself at the expense of another.

6. Similem usum habet haec observatio in *rebus judicatis*. Sententia in aliquo loco pronuntiata, vel delicti venia ab eo, qui jurisdictionem illam habet, data, ubique habet effectum, nec fas est alterius Reipub.. magistratibus, Reum alibi absolutum veniave donatum, licet absque justa causa, persequi aut iterum permittere accusandum; Rursus sub hac exceptione; nisi ad aliam Rempubl. evidens inde periculum aut incommodum resultare queat; ut hoc exemplo constare potest nostrae memoriae. Titius in Frisiae finibus homine percusso in capite, qui sequenti nocte, sanguine multo e naribus emisso, at bene potus atque cenatus, erat exstinctus; Titius, inquam, evasit in Transisulaniam. Ibi captus, ut videtur volens, mox judicatus et absolutus est, tanquam homine non ex vulnere exstincto. Haec sententia mittitur in Frisiam et petitur impunitas rei absoluti. Quanquam ratio absolutionis non erat a fide veri aliena, tamen Curia Frisiae vim sententiae veniamque reo polliceri, Transisulanis licet postulantibus, gravata est. Quia tali in viciniam effugio et processu adfectato, jurisdictioni Frisiorum eludendae via nimis parata futura videbatur, quae est tertii axiomatis exceptionis ratio. Idem obtinet in sententiis rerum Civilium, quo pertinet sequens exemplum memoriae quoque nostrae. Civis *Harlinganus* contractum iniverat cum *Groningano*, seque submiserat

6. The above rule applies equally to the subject of res judicata. A sentence pronounced in any place, or the pardon of a crime granted by one having jurisdiction, will have effect everywhere. Nor is it lawful for the magistrates of another state to prosecute, or suffer to be prosecuted a second time, one who has been acquitted or pardoned in another place, although without a sufficient reason; with this exception again, that no evident danger or prejudice will result therefrom to such other state, as may be seen from the following case within our memory. Titius struck a man on the head upon Frisian territory. The man having lost much blood through his nose, and having eaten and drunk heartily, died during the following night. Titius escaped into Transylvania. Being apprehended there, voluntarily as it seems, he is tried at once and acquitted as if the man had not died from the wound. This sentence is sent to Frisia and freedom from punishment is asked on behalf of the person acquitted. Although the reason for the acquittal may not have been untrue, it was nevertheless a serious question with the court of Frisia whether it should give effect to the foreign sentence and excuse the delinquent, although requested by the Transylvanians; for such an escape into the neighboring country and pretended prosecution appear to prepare the way too much for an evasion of the Frisian law, which is the basis of the exception under the third maxim. The same is true of judgments respecting civil matters, as is seen from the following example which is also within our memory. A citizen of

judicibus Groninganis. Vi submissionis hujus Groningam citatus, et cum non sisteret se, condemnatus fuerat, quasi per contumaciam. Petita executione dubitatum est, an concedenda foret, in curia Frisica. Dubitandi ratio, quod vi submissionis, si reus in territorio judicis, cui se submisit, non reperiatur, nemo contumaciae peragi possit, ut *alibi* videbimus: neque *sine detrimento jurisdictionis nostrae et praejudicio civium nostratium talibus sententiis effectus dari queat.* Concessa tamen est eo tempore; quibusdam Dominis ita censentibus; quod Frisiis non liceret arbitrari, quo jure sententia Groningae lata esset, modo secundum jus loci valeret. Alii hac ratione; quod Magistratus Harlinganus in urbe sua requisitus citationem permiserat, quod facere potius non debuisset. Alioqui Amstelodamenses negavisse executionem sententiae latae in absentem, per Edictum vi submissionis citatum ad Curiam Frisicam, et nemine contradicente damnatum, memini factum et recte meo judicio; propter limitationem axiomatis *tertii* commemoratam.

Harlem made a contract with a citizen of Groningen, in which he submitted himself to the judges of Groningen. Being cited to appear before the courts of Groningen, by virtue of this submission, and not appearing he is condemned as contumacious. Execution of the judgment being sought from a Frisian court, it was doubted whether it ought to be granted. The reason of doubting was that if the defendant was not found in the territory to whose judges he had submitted, he could not be proceeded against as contumacious, as we shall see elsewhere. Nor can effect be given to such judgments without detriment to our jurisdiction or prejudice to our citizens. It was granted, however, at that time, certain magistrates being of the opinion that the Frisians could not be allowed to inquire by what principle the judgment of Groningen had been pronounced, but only whether it was valid according to the law of the place. Others advance the reason that the magistrate at Harlem on request had granted a citation in his city, which he ought rather not to have done. Moreover, I recollect the fact that the magistrates in Amsterdam deny the execution of judgments by default, the defendant having been cited before a Frisian court by an order based upon submission and having been condemned without being heard, and in my opinion correctly, on account of the restriction contained in the third maxim.

7. Praeterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda aliud juris apud nos, aliud esset, ubi

7. Again, the question has been raised whether if suit is brought here upon a contract made elsewhere, and our law with respect to the allowing or denying the action differs from that of the place

contractus erat initus, utrius loci jus servandum foret. Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit Praescriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandia, ubi contractus initus erat, ejusmodi praescriptionem non esse receptam; Proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa *Justi Blenkenfieldt* contra G. Y., iterum inter *Johannem Jonoliin,* Sartorem Principis Aurausionensis contra N. B., *utraque ante magnas ferias 1680.* Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia cerebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causae cognitione et sententia. Ratio haec est, quod praescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendae, quae per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet. Sandius *lib. 1, tit. 12, def. 5,* ubi tradit, etiam in executione sententiae alibi latae, servari jus, in

where the contract was made, which law ought to govern? For example, a Frisian who becomes indebted in Holland, on account of merchandise sold there at retail, is sued in Frisia after the expiration of two years. He pleads our statute of limitations which is applicable to this class of debts. The creditor replies that such limitation does not exist in Holland, where the contract was made, and that it cannot be pleaded therefore in this action. But it was otherwise decided—once in the case of Justus Blenkenfieldt v. G. Y. and again in an action between John Jonoliin, tailor of the Prince of Orange, v. N. B.—both before the great fair in 1680. For the same reason, if someone should sue a debtor in Frisia on an instrument executed before a magistrate in Holland, which is entitled there to immediate execution, but not by common right, it will not have the same effect here, but will require an examination of the facts and judgment. The reason is that the statute of limitations and execution do not pertain to the substance of the contract but to the time and mode of bringing suit, which constitutes in itself a quasi-contract and a separate transaction. It is recognized, therefore, upon very good grounds, that in matters of procedure the practice of the place where the suit is brought is observed, even with respect to a transaction which has been entered into elsewhere. This is taught by John à Sande, lib. 1, tit. 12, def. 5, where he states that even as regards the execution of foreign judgments the law of the place where the execution is asked is to be observed and not

quo fit executio, non ubi res judicata est.

8. *Matrimonium* pertinet etiam ad has regulas. Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit, sub eadem exceptione, praejudicii aliis non creandi; cui licet addere, si exempli nimis sit abominandi; ut si incestum juris gentium in secundo gradu contingeret alicubi esse permissum; quod vix est ut usu venire possit. In Frisia matrimonium est, quando mas et foemina in nuptias consenserunt et se mutuo pro conjugibus habent, etsi in Ecclesia numquam sint conjuncti: Id in Hollandia pro matrimonio non habetur. Frisii tamen Conjuges sine dubio apud Hollandos jure Conjugum, in lucris dotium, donationibus propter nuptias, successionibus liberorum aliisque fruentur. Similiter, Brabantus uxore ducta dispensatione Pontificis, in gradu prohibito, si huc migret, tolerabitur; at tamen si Frisius cum fratris filia se conferat in Brabantiam ibique nuptias celebret, huc reversus non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur, eoque pertinet haec observatio; Saepe fit, ut adolescentes sub Curatoribus agentes furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus Curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quae apud nos hac parte

that of the place where the judgment was rendered.

8. Marriage also is governed by the same rules. If it is lawful in the place where it is contracted and celebrated it is valid and effectual everywhere, with the reservation that it does not prejudice others; to which reservation may be added that its example is not too revolting—for example, if an incestuous marriage in the second degree, according to the law of nations, should happen to be allowed anywhere, which is scarcely supposable. In Frisia it is a valid marriage if a male and female agree to marry and recognize each other as husband and wife, although no religious ceremony was performed. In Holland it would not constitute a marriage. The Frisian spouses will enjoy nevertheless in Holland, without doubt, the rights of husband and wife as regards marriage settlements and the rights of children to inherit the property of their parents, etc. In like manner, if an inhabitant of Brabant, who has married with papal dispensation within the prohibited degrees, should remove to this place the marriage will be recognized. If a Frisian, however, should go with the daughter of his brother to Brabant and be married there the marriage would not be recognized on his return to this place; because in this manner our law would be evaded by the worst examples, concerning which I should like to make the following observation: It often happens that young people under guardianship, desiring to unite their secret desires through the bonds of matrimony, go to eastern Frisia or to some other place where the consent of their guardian is not nec-

cessant. Celebrant ibi matrimonium et mox redeunt in Patriam. Ego ita existimo, hanc rem manifesto pertinere ad eversionem juris nostri; ac ideo non esse Magistratus heic obligatos, e jure Gentium, ejusmodi nuptias agnoscere et ratas habere: Multoque magis statuendum est, eos contra Jus Gentium facere videri, qui civibus alieni imperii sua facilitate, jus Patriis Legibus contrarium, scientes volentes, impertiuntur.

9. Porro, non tantum ipsi contractus ipsaeque nuptiae certis locis rite celebratae ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt. In Hollandia conjuges habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisia, licet ibi tantum sit communio quaestus et damni, non ipsorum bonorum. Ergo et Frisii conjuges manent singuli rerum suarum, etiam in Hollandia sitarum, Domini: cum primum vero conjuges migrant ex una provincia in aliam, bona, quae deinceps alteri adveniunt, cessant esse communia manentque distinctis proprietatibus; sicut res antea communes factae manent in eo statu juris, quem induerunt, ut docet Sandius *lib. 2, decis. tit. 5, def. 10,* ubi in fine testatur, inter consuetudinarios Doctores esse con-

essary to marriage, according to the provisions of the Roman law, which has been abrogated with us on this point. They celebrate their marriage there and presently return home. I consider this a manifest evasion of our law. Our magistrates are not bound therefore by the law of nations to recognize and give effect to marriages of this kind. And those especially would seem to act against the law of nations who marry citizens of another state by its facility, knowing such law to be contrary to their home legislation.

9. Furthermore, not only are the marriage contracts themselves, duly entered into in a certain place, to be regarded as binding and valid everywhere, but the rights and interests also attached thereto by the law of the place where they were celebrated. In Holland the spouses have a community of all their property unless they have stipulated otherwise in a marriage contract; this will be the effect with respect to the property situated in Frisia, although the community of property existing there is only of profit and loss and not of the property itself. Therefore Frisian spouses will remain the separate owners of their property even if it is situated in Holland. When the spouses migrate, however, from one province into another the property which may thereafter come to either will not be community property, but remain their separate property; and the property which had become community property before will retain the legal status which it had acquired, as is laid down by John à Sande, lib. 2, decis. tit. 5, def. 10, where it is stated at the end that

troversum, an immobilia bona etiam alibi sita in tali specie communicentur, quod nos affirmandum putamus. Ratio dubitandi, quod Leges alterius Reip. non possint alieni territorii partes integrantes afficere; sed responsio est duplex: prima, non fieri hoc vi legis alienae immediata, sed accedente consensu Potestatis summae in altera Civitate, quae legibus alienis in loco suo exercitis praebet effectum; sine suo suorumque praejudicio, mutuae populorum utilitatis respectu, quod est fundamentum omnis hujus doctrinae. Altera responsio est, non tantum hanc esse vim Legis, sed etiam consensum partium bona sua invicem communicantium, cujus vi mutatio dominii non minus per matrimonium quam per alios contractus fieri potest.

10. Verum tamen non ita praecise respiciendus est locus, in quo Contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. *Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit, l. 21. de O, et A.* Proinde et locus matrimonii contracti non tam is est, ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut

there was a controversy among the doctors of the common law whether immovables situated in another country were to be affected in like manner, in regard to which question we believe an affirmative answer must be given. The reason for the doubt was that the laws of one state cannot affect the integral parts of another territory. But the answer is a twofold one. In the first place, it is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon property within its territory, out of respect for the mutual convenience of the nations, provided, however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject. The second answer is that it is not so much by force of law as by the consent of the parties reciprocally communicating their property rights to each other, by which means a change of property may be effected, no less from matrimony than from other contracts.

10. The place, however, where a contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control. "Everyone is deemed to have contracted in that place, in which he is bound tb perform." (Digest, 44, 7, 21.) Hence the place of matrimony is not so much the place where the ceremony is performed as the place where the contracting parties intended to live. It happens every day that men in Frisia, natives as well as

omni die fit, homines in Frisia indigenas aut incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt; idque si in ipso contractu ineundo propositum habeant, non oritur communio bonorum, etsi pacta dotalia sileant, secundum jus Hollandiae, sed jus Frisiae in hoc casu est loci Contractus.

11. Datur et alia limitationis saepe dictae applicatio, in hoc articulo; Effecta contractuum certo loco initorum, pro jure loci illius alibi quoque observantur, *si nullum inde civibus alienis creatur praejudicium, in jure sibi quaesito,* ad quod Potestas alterius loci non tenetur neque potest extendere jus diversi territorii. Exemplum: Hypotheca conventionalis antiquior in re mobili, dat *πρωτοπραξίαν jus Praelationis,* etiam contra tertium possessorem, Jure Caesaris et in Frisia, non apud Batavos. Proinde si quis ex ejusmodi hypotheca in Hollandia agat adversus tertium, non audietur; quia jus illi tertio in ista re mobili quaesitum per jus alieni territorii non potest auferri. Ampliamus hanc regulam tali extensione; Si jus loci in alio Imperio pugnet cum jure nostrae civitatis, in qua contractus etiam initus est, confligens cum eo contractu, qui alibi celebratus fuit: magis est, ut jus nostrum quam jus alienum servemus. Exemplum: In Hollandia contractum est matrimonium cum pacto, *ne uxor teneatur ex aere alieno a Viro solo contracto;* Hoc

residents, marry wives in Holland whom they immediately bring into Frisia. And if they had such an intention at the time of the marriage there will be, in the absence of a marriage contract, no community of property according to the law of Holland; the Frisian law will be the place of the contract in this case.

11. There is in this connection a further application of the restriction often mentioned: the effects of contracts made in a particular place will be recognized elsewhere in accordance with the law of the former place, if no prejudice result therefrom to the citizens of such other country with respect to rights acquired by them, and the sovereignty of the latter place is not bound to extend, nor can it extend, the law of another territory so far. For example: a prior hypothecation by agreement of movable property confers *πρωτοπραξίαν* "a right of priority," even against a third possessor according to the law of Caesar and in Frisia, but not according to the Batavians. Hence if someone should proceed against a third party in Holland by virtue of such a hypothecation he would not succeed because the rights of the third party in the movable property cannot be destroyed by the law of another territory. We may enlarge the rule to the following extent: if the law of the place of contracting is contrary to the law of our state, in which a contract is also made, inconsistent with the contract which is entered into elsewhere, it is reasonable that we should observe our own law rather than the foreign law. For example: in Holland matrimony is contracted with the agreement that the wife shall

etsi privatim contractum valere dicitur in Hollandia, cum Praejudicio creditorum, quibus Vir postea obligatus est: in Frisia id genus pacta non valent, nisi publicata, nec obstant ignorantiam allegantibus justam, idque recte secundum jus Caesarum et aequitatem. Vir in Frisia contrahit aes alienum, uxor hic pro parte dimidia convenitur. Opponit pactum dotale suum; Creditores replicant, Jure Frisiae, non esse locum huic pacto, quia non est publicatum, et hoc praevalet apud nos in contractibus heic celebratis, ut nuperrime consultus respondi. Sed qui in Batavia contraxerunt, etsi agentes in Frisia, tamen repellentur; quia tum simplex unumque; jus loci contractus, non duplex, venit in considerationem.

12. Ex Regulis initio collocatis etiam hoc axioma colligitur. *Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personae alibi gaudent vel subjecti sunt, fruantur et subjiciantur.* Hinc qui apud nos in Tutela, Curave sunt, ut adolescentes, filiifam., prodigi, mulieres nuptae, ubique pro personis Curae subjectis habentur, et jure, quod Cura singulis in locis tribuit, utuntur fruuntur. Hinc qui in Frisia veniam aetatis impetravit, in Hollandia contrahens ibi non

not be liable for the debts contracted by the husband alone. Although it is a private contract it is said to be valid in Holland, to the prejudice of creditors to whom the husband may become later indebted. In Frisia such contracts would not be valid unless published, nor would ignorance of this fact constitute an excuse according to the law of Caesar and equity. The husband contracts a debt in Frisia and his wife is sued here for one-half the amount. She pleads the marriage contract. The creditors reply that by Frisian law the agreement is not valid because not published, and this contention prevails with us with respect to contracts entered into here, as I gave recently as my opinion when I was consulted. But those who contracted in Holland, notwithstanding such suit was brought in Frisia, were nonsuited because the law of the place of contracting came into consideration as the law of a single country and not as that of two countries.

12. From the rules laid down at the beginning the following maxim may also be derived: personal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place. Hence persons who with us are under tutors or curators, as young men, prodigals, or married women, are regarded everywhere as persons subject to curators, and will possess and enjoy such rights as the local law and guardianship bestow. Hence he who has bestowed upon him the rights of a

restituitur in integrum. Qui prodigus heic est declaratus, alibi contrahens valide non obligatur neque convenitur. Rursus in quibusdam Provinciis qui viginti annos excessere pro *majoribus* habentur, et possunt alienare bona immobilia, aliaque jura minorum exercere in illis etiam locis, ubi ante viginti quinque annos nemo censetur esse major; Quia Legibus rebusque judicatis aliarum Civitatum in suos subjectos quaelibet aliae potestas comiter effectum tribuunt; quatenus suo suorumque juri quaesito non praejudicatur.

13. Sunt, qui hunc effectum qualitatis personalis ita interpretantur, ut qui certo loco, major aut minor, pubes aut impubes, filius aut paterfam. sub curatore vel extra Curam est, ubique tali jure fruatur eique subjiciatur, quo fruitur et cui subjicitur in eo loco, ubi primum talis factus est aut talis habetur: proinde, quod in patria potest aut non potest facere, id eum nusquam non posse vel prohiberi facere. Quae res mihi non videtur habere rationem, quia nimia inde σύγχυσις jurium et onus pro vicinis ex aliorum legibus oriretur. Exemplis momentum rei patebit. Filiusfam. in *Frisia* non potest facere testamentum. Proficiscitur in *Hollandiam* ibique facit testamentum; quaeritur, an valeat. Puto valere utique in *Hollandia, per Regulam primam et secundam,* quod leges afficiant omnes eos, qui sunt in aliquo ter-

person of age in Frisia will not be granted restitution in Holland with respect to contracts entered into there. In the same way he who is declared a prodigal will not be bound by contracts entered into elsewhere. Again, in some provinces persons above the age of 21 are regarded as of age and may alienate their immovable property and exercise other rights going with majority even in those places where a person becomes of age only at 25, because whatever qualities are assigned to their subjects by the laws and judgments of any state will be given effect elsewhere, as long as no prejudice results therefrom to the rights of such government or to its citizens.

13. There are those who interpret the effect of a personal quality in another way. According to them he who according to the law of a certain country is of age or is under age, a puber or impuber, a house-son or *pater familias,* under guardianship or free from guardianship, will be governed everywhere as regards the consequence of this status by the very law which conferred such status upon him; so that what he can do or cannot do in his own country he ought to be allowed to do or to be prohibited from doing everywhere. This opinion does not seem to me well founded; there would result therefrom too great a confusion of rights, and from the laws of some states too great a burden for their neighbors. Some examples will make this clear. A house-son in Frisia cannot make a will. He goes into Holland where he makes a will. The question is whether it is valid. I think it is. At all events in Holland, by virtue of the first and second maxims, because the laws

ritorio: nec civile sit, ut Batavi de negotio apud se gesto, suis legibus neglectis, secundum alienas judicent. Attamen verum est, id heic in *Frisia* non habiturum esse effectum, per *regulam tertiam*, quod eo modo nihil facilius foret quam Leges nostras a Civibus eludi, sicut eluderentur omni die. Sed alibi tale testamentum valebit, etiam ubi filiisfam. non licet facere testamentum, quia cessat ibi illa ratio eludendi juris patrii per suos cives; quod in tali specie non foret commissum.

14. Hoc exemplum spectabat actum ob personalem qualitatem domi prohibitum. Dabimus aliud de actu domi licito, sed illic, ubi celebratus est, prohibito, in suprema Curia quandoque judicatum. *Rudolphus Monsema* natus annos XVII *Groningae* diebus quatuordecim, postquam illuc migraverat, ut pharmaceuticam disceret, Testamentum condiderat, quod ei in Frisia liberum erat facere, sed *Groningae*, ait *D. Nauta* Relator hujus judicati, non licet idem puberibus *infra XX annos, nec tempore morbi fatalis, neque de bonis hereditariis ultra partem dimidiam*. Decesserat ex eo morbo adolescens, herede Patruo, materteris legato dimissis, quae testamentum dicebant nullum, utpote factum contra jus loci. Heres urgere, personalem qualitatem ubique circumferri et jus ei in

of a state apply to all within its territory. Nor is it just that as regards acts done within their territory the Dutch shall put aside their own law and decide the case according to foreign law. But it will have no validity in Frisia, in accordance with the third maxim, because by that means nothing would be more easy for our citizens than to evade our laws, and they might be evaded every day. But elsewhere such a will would be valid even where by their laws a house-son could not make a will because in such a case there would be no evasion of the domestic law by subjects thereof and the above reason would therefore not apply.

14. The example I have given refers to an act which was prohibited at home on account of a personal quality. We shall give another act allowed at home, but prohibited where it was done, decided sometime ago by our Supreme Court: Rudolph Monsema, who was born and lived at Groningen, when he was seventeen years and fourteen days old went abroad to learn the business of a druggist. He made a will which he could have made in Frisia, but at Groningen, according to Dr. Nauta, the reporter of this decision, infants under twenty years of age are not allowed to do so, not even at the time of their last illness, for more than one-half their patrimony. The young man died of the sickness, leaving his uncle on his father's side as his heir and leaving nothing to his aunts on his mother's side, who contended that the will was void because it was made in violation of the law of the place. The heir urged that a personal quality accompanies the person everywhere, and that, as he could have made

Patria competens alibi quoque valere: sed judicatum est contra testamentum, convenienter ei, quod diximus, praesertim cum heic eludendi juris patrii affectatio nulla fuisset, etsi minime consentientibus suffragiis, *Nauta* quoque dissentiente. *Decis. M. S. 134. Anno. 1643. d. 27, Octobris.*

15. Fundamentum universae hujus doctrinae diximus esse et tenemus subjectionem hominum infra Leges cujusque territorii, quamdiu illic agunt, quae facit, ut actus ab initio validus aut nullus alibi quoque valere aut non valere nequeat. Sed haec ratio non convenit rebus immobilibus, quando illae spectantur, non ut dependentes a libera dispositione cujusque patrisfamilias, verum quatenus certae notae Lege cujusque Reipubli. ubi sita sunt, illis impressae reperiuntur; hae notae manent indelebiles in ista Republ. quicquid aliarum Civitatum Leges aut privatorum dispositiones secus aut contra statuant; nec enim sine magna confusione praejudicoque Reip. ubi sitae sunt res soli, Leges de illis latae, dispositionibus istis mutari possent. Hinc Frisius habens agros et domos in provincia Groningensi non potest de illis testari, quia Lege prohibitum est ibi de bonis immobilibus testari, non valente Jure Frisico adficere bona, quae partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit Testamentum jure loci validum, id effectum

the will at home, he could make it abroad. But the decision was given against the will, consistently with what we have said, especially since there was no intention to evade the home law. The decision was, however, by no means universally approved, Nauta himself dissenting. (Decis. M. S. 134. October 27, 1643.)

15. The foundation of all this doctrine we have said and maintained to be the subjection of all men to the laws of a country so long as they remain therein; whence it follows that an act valid or invalid from the beginning is also valid or invalid elsewhere. But this observation does not apply to immovables when they are considered, not as to their dependency upon the free disposition of the respective owners, but as to the extent in which certain qualities are found impressed upon them by the law of the particular country in which they are situated; such qualities remain unaffected in such state irrespective of what the laws of other states or the agreements of individuals may provide to the contrary. For it is evident that the laws applicable to such property, enacted by the state in which the immovable property is situated, cannot be changed by such disposition without great confusion and prejudice to the state. Hence a Frisian who owns fields and houses in the province of Groningen cannot dispose of them by will, because it is prohibited there to dispose of immovables by will, for the Frisian law cannot affect property which constitutes an integral part of another territory. But is this not opposed to what we stated above, that if a will is validly executed according to the law of the place

habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia Legum diversitas in illa specie non afficit res soli neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, Lex Reipubl. non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a Lege loci impressus laeditur aut imminuitur. Haec observatio locum etiam in Contractibus habet: quibus in *Hollandia* venditae res soli Frisici, modo in *Frisia* prohibito, licet, ubi gestus est, valido, recte venditae intelliguntur; idemque in rebus non quidem immobilibus, at solo cohaerentibus; uti si frumentum soli Frisici in *Hollandia* secundum *lastas*, ita dictas, sit venditum, non valet venditio, nec quidem in *Hollandia* secundum eam jus dicetur, etsi tale frumentum ibi non sit vendi prohibitum, quia in Frisia interdictum est et solo cohaeret ejusque pars est. Nec aliud juris erit in successionibus ab intestato; Si defunctus sit Paterfamilias, cujus bona in diversi(s) locis imperii sita sunt, quantum attinet ad immobilia servatur jus loci, in quo situs eorum est; quoad mobilia, servatur jus, quod illic loci est, ubi testator habuit domicilium, qua de re vide Sandium *lib. 4, decis. tit. (VIII) def. 7.* Sunt hae definitiones ejusmodi, ut a latiori explicatione non abhorreant, quando Statutarii Scriptores non desunt, qui de nonnullis aliter existimaverint, quos vide laudatos apud Sandium in Decisionibus praedictis, quibus adde, quae novissime tradit Rodenburgius *tract. de jur. quod orit. e Stat. divers.* inserto *libro de jure Conjugum.*

it should have effect even as to property situated elsewhere, where it is lawful to dispose of it by will? No, because the diversity of laws in this respect does not concern immovable property but regulates wills. The will having been properly made, the law of the state does not invalidate it as regards immovable property so far as no quality impressed upon it by the law of the place is affected or impaired. This rule applies also to contracts. Frisian immovable property, sold in Holland in a manner prohibited by Frisian law but allowed in Holland, is deemed lawfully sold, and this is true, not only as regards the immovables themselves, but also with respect to things attached to the soil, so that if corn growing in Frisia is sold in Holland according to the lasts, as it is called, the sale is not valid—not even in Holland—although the sale of such corn is not forbidden there, because it is prohibited in Frisia and because it is attached to the soil and is a part of it. The same rule applies to intestate succession. If the decedent is the father of a family whose property is situated in different parts of the country, the law of the situs governs as regards immovables. But with respect to movables the law of the place where the testator had his domicile is applied, for which see, John à Sande (lib. 4, decis. tit. VIII def. 7). These rules are such that a fuller explanation might be given, inasmuch as writers are not wanting who think otherwise in some particulars, and who are mentioned by John à Sande in the decisions referred to above, to which add Rodenburg's recent "Tract. de jure quod orit. e stat. divers.," which is appended to his work on the law of husband and wife.

PART VIII

PUBLIC LAW

A—THEORY

MONTESQUIEU AND ANGLO-AMERICAN INSTITUTIONS

By William G. Hastings[1]

Generalization in any broad extent is in some degree a falsification. At its best it is the production of truth, not for contemplation, but for use. Montesquieu is par excellence the generalizer of English institutions and was so accepted in America, and that is what has resulted in the case of his conclusions with regard to them. Indeed, his method was substantially the method of the woodchopper in cutting and trimming trees for the utilization of the timber. Just as it becomes necessary to chop off limbs and twigs, even to go to the extent of cutting into lengths and on occasion to splitting the tree trunk for convenience in carriage and in use, so he doesn't hesitate to chop up institutions for purposes of philosophic consideration. He has generalized in a style that takes all kinds of liberties with the past of those institutions and sometimes with their present, but has profoundly affected their later development.

I

The famous division of the powers of government into legislative, executive, and judicial, clearly enough does violence to the his-

1. [The author was born at Woodstock, Ill., April 9, 1853; graduated at University of Chicago, 1876; admitted to the Nebraska bar, 1877; member of the Nebraska Senate, 1885-7; Prosecuting Attorney of Saline County, Nebraska, 1889; Judge District Court, Seventh Judicial District, Nebraska, 1891-1900; Supreme Court Commissioner (Neb.), 1901-4. He is now Dean of the University of Nebraska Law School and acting Chancellor of the University. He was also Nebraska Commissioner on Uniform State Laws. He is author of the prize essay of the American Philosophical Society entitled "The Development of Law as illustrated by the Decisions upon Police Power"; translator from the Russian of Korkunov's "General Theory of Law" (which has been made a part of the Modern Legal Philosophy Series); and is Associate Editor of the Modern Legal Philosophy Series. Dean Hastings has been one of the pioneers in the movement of recent years to broaden the outlook of law studies. and is one of the most esteemed and distinguished members of the profession of law teachers in America.—Ed.]

tory of the English judiciary. In its origin the judiciary was so clearly a branch of the executive that Blackstone does not hesitate to call the king the fountain of justice and to claim the right of administering it as one of the prerogatives of the Crown. He still in the middle of the eighteenth century declares the monarch to be the sole source of jurisdiction and the only possible originator of courts.

He does not, however, escape the effect of Montesquieu's doctrine. Characteristically enough, after putting forth his strenuous claim for the powers of the Crown, a few pages later he makes use of the following language distinctly adapted from Montesquieu's "Esprit des Lois."

> "In this distinct and separate existence of judicial power in a special body of men, nominated indeed but not removable by the crown, consists one main preservation of the public liberty which cannot subsist long in any state unless the administration of common justice be in some degree separated both from the legislative and also from the executive power."[2]

It would be difficult without in terms translating the declaration of Montesquieu on this same subject to reproduce it more accurately.

It is not, however, his famous reducing of the powers of government into the three forms, or departments, of legislative, executive, and judicial, which constitutes the most pervading of Montesquieu's generalizations relating to English institutions. It would be difficult, indeed, to exaggerate the influence which his trinity of government powers has had in the modern world. That influence goes far enough so that Sir Henry Maine affirms in a passage which James Bradley Thayer thought worth while to quote in the notes to his cases on constitutional law "that there is not the least probability that the American constitution in anything resembling its present form would ever have been written had Montesquieu not published his "Esprit des Lois" and his analysis of the powers of government into the three forms of legislative, executive, and judicial."

Sir Henry thinks that the most vital and original feature of the American constitution is the independent Supreme Court, and that this institution clearly owes its suggestion to Montesquieu's mistaken notion of the independent origin of the English judiciary.

But, however important this tripartite division of the government into legislative, executive, and judicial may have been, a far deeper and profounder generalization is put forth by Montesquieu in regard to English institutions. It is the proposition clearly set

2. "Com." i, 269.

forth in the "Esprit des Lois", that the fundamental principle on which English institutions have been developed is individual liberty and that the basis for this leading principle is the solidity of property rights and equality of the citizen in regard to them.

II

Of course, Montesquieu is a pre-revolutionary. His countryman, Scherer, even attributed to him as his greatest proof of quality his capacity to survive the French revolution without having been a part of it. Scherer thinks Voltaire like Rousseau ought to be recognized as one of the phenomena of the revolution itself. He takes Montesquieu at his own valuation as a representative mind developed under and characterized by the qualities of the old régime. This is so far true that if we analyze the difference between his ideas and those of his younger contemporaries and successors, it will be found to consist in the fact that he does identify individual liberty with legal and especially property rights rather than with political power. The basis for attributing to Montesquieu the position of the generalizer of English institutions rests upon his declaration that liberty is their main thesis, and that the doing of that which is permitted by law, i. e., the upholding and maintaining of property rights in whomsoever those rights inhere, is the essence of such liberty. Such an interpretation of English institutions requires for its completion the setting of the courts apart from, if not above, the other instrumentalities of government, a consequence which Montesquieu himself recognized, but which has been more fully developed by subsequent thinkers, especially De Tocqueville.

We could not venture to call Montesquieu the generalizer of English institutions if he had no following. He would not be their generalizer on the basis of his interpretation of their past. Probably he was not very well informed as to what their past had been. Perhaps if he had known it better, he would have had no such influence on their future. We may recognize clearly enough when he points it out that the institutions developed on English soil consisted mainly of recognitions of individualism, and that their chief resort for working it out was through local organization and defense of the right of property, especially by means of law courts and juries.

This is far from saying that the men who organized those institutions had any consciousness of this as their leading principle or purpose. They probably had no more thought or intention of such a result than the organizers of the English language had of the law

of vowel changes or of the disappearance of inflections which have controlled its formation. To be sure, Harrington, the philosopher of the puritan revolution as Locke was of the Whig revolution of 1688, distinctly makes of government in general a combination of institutions for the protection of property. Webster in his Plymouth Rock oration almost, if not quite, accepts this as orthodox New England doctrine. But neither of them seems to have thought that it was anything peculiar to English institutions. Montesquieu's eighteen months in England showed him what was the practical working and effect of those institutions upon English society, and whither before his eyes they were visibly tending; and he saw it with a distinctness that enabled him to so state it as to be convincing to those of his contemporaries whose attention he could get. Among these latter must be reckoned Sir William Blackstone.

Montesquieu's name occurs at least once in the text of the commentaries. There are a few citations of it in Blackstone's notes, though not many. There is, however, not an atom of question as to where Blackstone got his notion of a distinctly separate judiciary as well as that of complete distinction between the powers of the Crown and the powers of Parliament. Still less is there any question of where he got his notion of fundamental rights. There is no more question that Blackstone's greatest generalization, viz., that the whole ensemble of English laws and institutions exists for the purpose of promoting the liberty, or as he calls it, the liberties of the individual, comes from Montesquieu, than there is that our own statutes and constitutions derive that same doctrine from Blackstone; and, of course, Blackstone's liberty is before all else the liberty to own, keep, enjoy, and dispose of one's property. This is his development of Montesquieu's liberty, which was the right to do what the laws permitted. It is idle for Mr. H. G. Wells in his "Future of America" to reproach us with the fact that the liberty with which the statue in New York harbor is enlightening the world is simply liberty to acquire, keep, and dispose of property. Trotzky's same complaint comes with better grace. We may be a little more archaic in that matter than our English cousins, but we brought that liberty straight from the old island, and Blackstone was its apostle, and he got it from Montesquieu.

Hear Montesquieu:

> "There is also one nation" (England) "in the world which has for the direct object of its constitution political liberty. We are going to examine the principles upon which that constitution is founded. If they are sound, liberty will appear as in a mirror."

A little farther on he defines this "political liberty" as security of persons and possessions.

Then Blackstone:

"No man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is that every other man would also have the same power, then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws and (no farther) as is necessary and expedient for the general advantage of the public." ("Com." i, 125.)

Again:

"The principal aim of society is to protect individuals in the enjoyment of those absolute rights which are vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. * * * The principal view of human law is or ought always to be to protect and enforce such rights. * * * (Id. 124.)

"The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms where it falls little short of perfection and can only be lost by the folly or demerits of its owner." (Id. 127.)

All this clearly is derived from Montesquieu. Lord Mansfield's famous judgment in Somerset's case that the Virginian slave brought to England could not be compelled to return because domestic slavery was unknown to English law, the chief justice declaring that "the air of England is too pure for a slave to breathe," dates from 1772, and Blackstone's lectures, of course, from 1753, and his book from 1765. Montesquieu's "Esprit des Lois" was published in 1748.

Harrington and Locke had failed to recognize that this special feature, individualism, based on a natural right of property recognized by law, was a peculiar feature of the English constitution. The Frenchman perceived it. Montesquieu had lived through a youth of Jesuit schooling and dissipation, a manhood of employment as a hereditary judge and manager of courts. Later he abandoned such work, apparently not finding it to his taste, and established himself on the abundant fortune which had fallen to his lot by the death of various relatives, as a country gentleman living on his own estate. Before settling down to this last character, he had spent a few years in traveling over Europe, including nearly two years in England. He had achieved a distinguished literary success by his Persian

letters, which were represented as passing between Persian friends, two of whom were traveling in France and western Europe. He was a trained lawyer and business man and a literateur as well. He looked at the contemporary institutions of England with a sympathetic eye and he proceeded to interpret them broadly in his famous "Esprit des Lois."

Scherer is doubtless correct in saying that the work is decidedly a pre-revolutionary one. It is pre-revolutionary in the sense that it is dominated by realistic perceptions, and not by mystical or sociological theories. It is pre-revolutionary, too, in looking to individual rights and development rather than towards political power for the masses. To this hereditary judge who saw all over the world hereditary rulers and had found in England hereditary legislators, there was nothing repugnant in the proposition that political authority should be created and treated as patrimonial property. His notion of the authority of the state is clearly the medieval, or immediately post-medieval, one that government consists in dominion rather than in empire or imperium; that it is rather an ownership than a mere commission to command. Jurisdiction naturally belonged, as he thought, to the holder of the land in his territorial capacity, a doctrine which survives in our state constitutions in the provision that each officer shall be a resident of the district for which he serves, which survives also in our federal constitution in the provision that each member of the House of Representatives shall be a resident of the state which sends him to Congress. It is found, too, in the requirement of a jury from the vicinage, which was one of the principles of the English common law for which the colonists rebelled in 1776. The same principle prevented the trial of that assassin of a district judge who was held for some six or seven years in one of the Kansas counties because no jury could be obtained from the county to try him. Opinions had become so fixed that no twelve men could be found to qualify, and he was finally discharged rather than have the state of Kansas enact any special law to provide a hearing for him in another county.

That Montesquieu should have recognized this domanial authority and its machinery of courts as the leading feature of the working English government of his time, and that the idea was sound enough to be taken up by Blackstone as the leading generalization in his "only law book which is also literature" would be glory enough for one man, even for a Frenchman. A greater field, however, for the exploitation of this generalization was shortly

opened. Not only was Blackstone made at once the law authority for the colonies so that this generalization was promptly incorporated into constitutions and statutes on this side of the Atlantic, but James Madison, "the father of the Constitution" with his own hand wrote out for Washington's use a translation of so much of the "Esprit des Lois" as bore specifically upon the English constitution.

The result, by the help of local tendencies, was to give to our institutions the special juridical character which was so emphatically remarked upon by De Tocqueville and which has made them unique ever since. In no other country have the courts played such a rôle in the administration of its political affairs as they have done in our own. It is a legitimate consequence of an organization based on law to be domanially administered whether in townships or manors. It is the mere expansion of the village organization with its village or township assembly and its local officers.

Montesquieu in generalizing it as the prime quality of the English social organization, distorted it quite as much as he distorted the historical position of the courts in making them independent of the executive. The distortion is inseparable from the generalization. No principle develops itself purely and unmodified by accompanying ones. Local authority organized to maintain domanial institutions with individualism and property rights was doubtless specially characteristic of England, but it was by no means the whole of its political development, even in an age when the landed interests completely controlled Parliament in both houses. There has always been, at least in historic times, an imperialist element as well. It was not Montesquieu's mission to call attention to this but to the other, the local and semi-patrimonial element. In doing so he inevitably exaggerated as did his followers, Blackstone and the American government builders. The adopter of a generalization has to form it by laying aside other incongruous features.

Not long since a distinguished and competent critic was comparing Sophocles and Shakespeare and keenly showing the objectivity of the ancient poet's art and the subjectivity of the modern one. He ended finally with a thoughtful and regretful declaration that he had overstated the difference. Of course he had. To make his distinction at all convincing he had to leave out of view for the moment all that was clearly subjective in Sophocles and all that was strongly objective in Shakespeare and take the latter where he was especially under the sway of his own moods. The consequence

was an overstatement. Great literary art in all ages has been and must be both subjective and objective.

The organization for the maintenance of liberty and individual rights, largely local and juridical as it was in England, had to be supplemented even there by the imperium, the consolidated national force, and its command for use abroad and on behalf of nation-wide interests at home provided for.

Royalty in France, of course, was from the day of Clovis down frankly imperial. The Norman conquerors in England certainly made and to a great degree maintained themselves as kings by means of the sword, but to keep their authority they had the good sense to see that they must unite themselves with local instruments of authority. They asserted a royal prerogative to administer justice, but they proceeded to establish royal courts which were required to associate to themselves jurors from the vicinage in order to administer it. They had an appointed royal sheriff, but they required of him that he should hold county courts consisting of free suitors in that court. In England by these concessions and by various others, too numerous and some of them too obscure to be developed here, the imperialistic royal authority was enabled to keep in touch with the localized dominion and both were able to resist the tendency towards the aggrandizement of great proprietors whom courts of local jurisdiction and of patrimonial authority tended dangerously to elevate. Over the rest of Europe, the struggle between the royal organization and the feudal nobility led to different organizations with the imperial element tending to gain the uppermost. The military organization was becoming the state and absorbing the rest of it.

The French Revolution came as an outbreak of the bourgeoisie against intolerable conditions laid upon them by a combination of royalty, clergy, and nobility. The struggle between the middle class interests and the higher ones released the city proletariat and it seized upon the already centralized royal authority. Rousseau's doctrine of a government controlled by the general will is simply the royal imperialistic general authority originally represented by the military organization in the field, the old Roman imperium, transferred to the mass of the people considered without reference to subdivision or locality. The struggle between the commonalty and the nobility and clergy became simplified by the retirement of the king when the army passed from under his control. The proletariat took over his rights and seized the machinery of the centralized

royal government. The enthroned populace put an end to feudal rights. "Vox populi vox Dei" became the admitted substitute for the divine right of kings. Unlimited authority could be conveyed by the one as readily as by the other. Both are equally at variance with any inalienable rights of the individual and we reach Rousseau's doctrine of a "general will" that knows none but self limitations.

The old scheme of imperialism can be legitimatized in modern times only by throwing over it the color of popular authority through the means of a plebiscite. A plebiscite is the best basis I know of for autocratic authority, said Bismarck. A French writer, M. Léon Duguit, has put forth recently a thesis that the conversion of authority from the patrimonial conception to the imperial one by means of a plebiscite is a corruption of the original purpose of the French Revolution and is based upon Rousseau's doctrine of a general will, "volonté generale"; and that government by a general will is nothing more or less than tyranny by the mob. What we see going on at the present moment in Russia seems to be an exemplification of this very thing. In the name of the mass of the people, the Bolsheviki have seized upon the fragments of the Czar's governmental machinery and have undertaken to adapt it to a government of force with the proletariat of western Russia as the wielder of it. "They are apostles," says Mr. Steffens, "of the Marxian socialism." Marxian socialism is nothing more or less than a doctrine that property rights are the product of force; that political machinery is the means by which force acts to create and perpetuate property rights, and these are to be seized and held for the general benefit by use of main force; and that the non-property holder has nothing to do but to get hold of that political force and control it in order to substitute its results on his own behalf for existing property rights.

This is substituting cause for effect. It was not the possession of political power which gave to its holders the control and possession of property. Political power on the contrary is one of the subsidiary results of the organization of property holders. It is clear that force alone cannot be operated to bring about accumulation of property or even to regulate protection of property. When it becomes mere naked force, deprived of all legitimacy, it will speedily result in the starvation of its employers as well as of its victims. The question which we are compelled to ask ourselves is, whether we can stop with Montesquieu's generalization that our institutions should be devoted to strengthening the liberties of the

individual, whether we can stop with the proposition that there is no need to develop the tremendous power and authority which is possible under imperial government, so as to promote properly and sufficiently the general welfare. It seems to be clear that under Montesquieu's interpretations of English institutions, they are incompatible at least with the permanent maintenance of any great amount of imperialistic military force.

III

The great struggle in the world, now interrupted, was carried on to determine whether an imperialistic organization seeking to legitimatize itself by the general popular consent is really a better authority, better capable of organizing society and carrying on the means of protection and the pursuit of happiness than is a free society whose effort is to promote individual energy and secure to the individual as far as may be the result of his activity. That is, Montesquieu's conception is at war against the imperialistic development by Kant and Hegel of Rousseau's idea which was no doubt originally suggested by Montesquieu's conception of a government organized for the establishment of political liberty such as he conceived the English government to be.

We began with the proposition that generalization is falsification. The broad one made by Montesquieu and adopted by Blackstone and by American constitution makers is no exception. It needs no parade of the historical facts to show that in truth imperialistic elements of centralized force were not lacking in the English government. In fact, its legalized juridical control over its citizens was often extremely rigid. His ability to characterize it broadly and generally as having liberty for its guiding principle depended upon his suppressing the counter considerations. When he announced his generalization that the English government was the only one in which the freedom of the individual was the main object, he was suppressing the counter considerations. He had recognized the fact that in Great Britain with her insular position the need for developing the imperialistic side, that is to say, the military side, the side carrying the imperium, had been comparatively small, and the development of that side of her government as compared with what he saw in other countries had been so slight that he felt justified in lopping it out altogether in order that he might see and state more clearly what had been done on the other

side in the way of the establishment of individual rights. And his suggestion was potent enough to have Rousseau first and Kant after him declare that such accomplishment of liberty was not only the main purpose of political organization, but was the true end of moral teaching and of all social and religious, as well as of all political, constructions. Such a notion was taken up and developed on this side of the Atlantic broadly and extensively. It is not too much to say that Montesquieu's generalization would not work on this side of the Atlantic, even among the thirteen colonies with the whole wilderness behind them and with no centralized government over them. In order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty, the colonists found it necessary to establish an imperialistic central government, and apparently they had no prophetic view of the demands for such organization on the part of modern industrialism, either. They found it impossible to get along with merely their state governments which only provided for non-interference by the local citizens with each other. They found it necessary, if they were to maintain their necessary commerce on the high seas, the well-ordered necessary relations between the several states, and were to answer the requirements of an advancing civilization on this side of the Atlantic, to provide for an active governmental agency qualified and commissioned to act on behalf of all. They provided it, while carefully restricting its powers, and evidently did it with fear and trembling. They marked it as a distinctly voluntarily created agency without any divine rights and to be changed whenever a sufficiently persistent and a sufficiently supported demand for such a change should arise among the people. It was, however, distinctly a carrying of their own government away from the common people and putting it in specially selected hands with a view to promoting the general good.

It is perfectly certain that a like imperialistic element was a large part of the English constitution; that it was energetically organized by the Norman kings; that many times and sometimes for centuries this imperialism was the dominating element in the English state. And it is clear that Montesquieu's generalization was so far a falsehood, so far a lopping away of important limbs of English institutions, which were apparently atrophied and had lost their usefulness. What do we see as the practical war government of Great Britain? It passed out of the hands of the immediate repre-

sentatives of the people and was lodged for practical purposes in a committee of the Empire and not a little of it passed over to the general War Council of the Allies at Paris. It is clear as anything can be that in order to maintain an effective modern state, able to take care of itself in a more or less predatory modern world, a power, call it police power, imperium, dominium, or what you will, must be found that can provide for the common defense and promote the general welfare. Influential and powerful as Montesquieu's generalizations have been, they by no means tell the whole story.

A LEGAL HERESY

By JOHN M. ZANE[1]

In one of the Year Books of Edward I, a sergeant-at-law, arguing to the court, was driven by the exigencies of his case to assert that a female serf, who had become free by marrying a free man, was remitted to her servile status as soon as she became a widow. "That is false," sharply interrupted one judge. "Worse than false, it is a heresy," added Justice Staunton. A statement of law that was both false and heretical was then a professional misdemeanor. In the case of a judge at this day we may venture to say that it is at least an indiscretion, but when it lends support to the atrocious German theory of law and justice which has desolated much of the world, it becomes a duty to expose its hollowness.

I

It is my purpose in the following article to examine such a statement of the law by one of the justices of the Supreme Court,[2] not made on the spur of the moment, but in what we may suppose to be a deliberately considered opinion. One justice, Harlan, cautiously concurred in the judgment, but no one challenged the statement. There was no Staunton to denounce it as a heresy, yet a

1. [The author was born at Springfield, Ill., March 26, 1863; graduated (A.B.) at the University of Michigan, 1884; Clerk of the Third District Court of Utah, 1884-8; admitted to the Utah bar, 1888; Assistant United States Attorney (Utah) 1889-93; reporter of the Utah Supreme Court, 1889-94; in practice at Salt Lake City until 1899, when he removed to Chicago, where he continues in active practice. He is the writer of a treatise on Banks and Banking (1900); has been lecturer on Legal History in Northwestern University and on Mining Law in the University of Chicago; and has been a frequent contributor to law reviews. The author has heretofore been best known to the learned world through his writings and lectures on legal history, especially of the Year Book period. His notable essay, "The Five Ages of the Bench and Bar of England," was incorporated in "Select Essays in Anglo-American Legal History," Vol. I (Boston, 1907), pp. 625-729.—ED.]

2. The opinion in which the language is found is by Justice Holmes, *Kawananokoa* v. *Polyblank*, 205 U. S. 349. In Michigan Law Review, XVI, 349, note, the case is noted in my article on "German Legal Philosophy" and its dangerous tendencies indicated in connection with the philosophy of law, but it was not possible within the limits of that article to give the statement a critical examination by showing that the authorities cited do not justify the assumed principle.

heresy it is and a very dangerous heresy in times like the present. This is the statement:

"Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends. 'Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.'* [For one can very well receive law from another, but it is naturally impossible to give law to oneself.] Bodin, "République," 1, chap. 8, ed. 1629, p. 132; Sir John Eliot, "De Jure Majestatis," chap. 3. *'Nemo suo statuto ligatur necessitative.'* [Necessarily, no one is bound by his own statute.] Baldus, "De Leg. et Const. Digna Vox," 2ed. 1496, fol. 516; ed. 1531, fol. 61.)"

The principle asserted here is that no law can create a legal right against the government. Probably the remainder of the court being thoroughly satisfied that a sovereign was immune from suit were not interested in the bad reason given. Perhaps some were intimidated by the array of exotic authorities, not one of which had ever before masqueraded as a legal authority in the Supreme Court. The present Chief Justice no doubt indulgently shrugged his shoulders when he heard the Latin and the medieval French, and thought of Horace's witticism:

> Purpureus, late qui splendeat, unus et alter
> Adsuitur pannus.[3]

But if it be true that "there can be no legal right as against the authority that makes the law on which the right depends," if that is the point which we have reached under what we have believed is, as the Massachusetts constitution says, "a government of laws and not of men," we may as well apologize to Germany at once for daring to question the divine right of government to override every law, contritely confess "nostram culpam, nostram maximam culpam," and start anew on a truly Hegelian basis; for the divine right of government is simply the divine right of kings "writ large."

In many cases the Supreme Court had ruled the exact opposite.

3. *Horace*, "Ars Poet.," 15: "A crimson patch or two is sewed on to glitter showily far and wide." I speak of the Chief Justice in connection with Horace, for all lawyers will remember how gracefully he welcomed Lord Haldane at Montreal for the American Bar Association with the happy quotation:

> Caelum non animum mutant qui trans mare currunt.

("'Tis the sky and not in mind they change, who cross the main": *Horace*, "Epistles," I, 11, 27.)

I cite merely the words of Justice Brewer in a great case: "The government is as much bound by the laws of Congress as an individual."[4] In a masterly opinion by Justice Miller the very grounds of the exemption of a government from suit without its own consent had been examined and he had reached a wholly opposite conclusion from Justice Holmes. In words that breathe the spirit that has made ours the typical government of law, he said: "It (the law) is the only supreme power in our system of government and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but *also upon the rights in controversy between them and the government.*"[5] Nothing was farther from his mind than to suppose "that there can be no legal right as against the authority that makes the law on which the right depends." In that very case the court recognized rights against the government and showed that those rights could be enforced by suit against the officials, although the government attempted to protect them, and asserted the act to be its own.

The Chief Justice of the court has used language which has little in common with the idea that the government is not bound by the laws. In the proceedings on the death of the second Justice Lamar he must have been stating his own settled convictions: "No thought of mere expediency, no mere conviction concerning economic problems, no belief that the guaranties were becoming obsolete or that their enforcement would incur popular odium ever swayed his unalterable conviction and irrevocable purpose to uphold and protect the great guaranties with every faculty which he possessed."[6]

4. *United States* v. *American Bell Telephone Co.*, 167 U. S. 224, 269.

5. *United States* v. *Lee*, 106 U. S. 196. This case involved the seizure by the government of the estate of Arlington which George Washington Parke Custis had inherited from his father Parke Custis, the stepson of Washington. It had been the scene of a princely hospitality, worthy of Washington's grandson, during the life of G. W. P. Custis. He devised the estate to his daughter, Mrs. Robert E. Lee, for life with remainder to her son, G. W. P. C. Lee. After the war was over the officers of the government were sued in ejectment. The government appeared, avowed the acts of its officers, pleaded its own immunity from suit, and was defeated as it should have been. See also *The Siren*, 7 Wall. 152; *The Davis*, 10 Wall. 15; *Carr* v. *United States*, 98 U. S. 433.

6. 241 U. S., Appendix II. In those proceedings the Attorney General compared the deceased to "the fragrant white water-lily of the Concord River" and its marvelous capacity for absorbing only loveliness and perfume. For strained metaphor this has not been equaled since a bloviant congressman began his eulogy upon Senator Vance with the words: "My

Perhaps it may be said that the constitution with its guaranties is a law provided by a power higher than the government, but if there were no constitution the government would still be bound by the laws, and rights against the government would still spring from them. I shall show that the legal proposition that the government does not grant rights against itself by the laws it promulgates, never was the law at any time since the days of Augustus, that Justice Holmes is mistaken as to the meaning of his authorities, that even if Hobbes or Bodin or Sir John Eliot had asserted such a principle, it would be a mistake to quote either of them as a jurist. The brocard[7] which Justice Holmes repeats will be traced to its earliest sources, and it will appear that all that these men intended to assert was either that the ruler was not affected by private laws not applicable to the monarchical head of the state, or that no legislator or legislative body could bind his or its successor. The latter doctrine has never been disputed except by our Supreme Court in the following very peculiar case. It is well known that the constitution does not extend ex proprio vigore over the territory of the United States, though Congress commonly by act has so extended it. After it has once been so extended, it is said that no subsequent Congress can repeal the act.[8] Congress thus can bind its successor irrevocably; but this statement of supposed law is probably a private heresy of Justice Brown. Aside from this remarkable case statutes may be repealed ("nemo suo statuto ligatur"), for the sufficient reason that legislation could not exist if statutes were irrepealable. Yet statutes while in existence bind the government as well as the citizen; they may confer

tongue is in the coffin with Vance," and no doubt most of his hearers bitterly regretted that he was not telling the truth. But Mr. Hannis Taylor was even more astonishing. Having lately written "Cicero and His Works" he quoted freely from the "De Amicitia" and introduced a quotation by saying, "In speaking of his lost and cherished friend Scipio, the great word painter [Cicero] said"—I reflected with some surprise that the younger Africanus was assassinated in 129 B. C., while Cicero was born in 106 B. C., and I wondered in what prior existence of Cicero it was that Mr. Taylor supposed that the great "word painter" had made the acquaintance of the younger Scipio, "his lost and cherished friend." It seems needless to say that Cicero represents in his "De Amicitia," *Laelius* as speaking and it is *Laelius* who bewails "his lost and cherished friend." Lord Bowen once after listening to some melancholy deliverances on the retirement of Sir James Fitzjames Stephen from the bench, cynically quoted:

"And may there be no moaning of the bar
When I put out to sea."

7. An old lawyer referred to brocards as "plaustra brocardiorum obscurare sacrosanctam veritatem et cognoscendi religionem" (cartloads of brocards to obscure the holiness of knowledge and the sacrosanctitude of truth).

8. *Downes* v. *Bidwell*, 182 U. S. 244, 270, per Justice Brown.

irrevocable rights on the citizen as against the government or its laws.[9] Justice Holmes has taken a proposition applicable to the government *only when legislating for the future,* and has applied it to the government when adjudicating on past facts. It will appear that the proposition of Justice Holmes, that no government can give law to itself, when it is applied to judicial or executive action, or to legislative action attempted to be made to govern the past, in his assertion that the laws can give no right to the citizen as against the government, is emphatically in the language of the worthy Staunton, "worse than false, it is a heresy." This heresy I shall examine first from the standpoint of its theoretical invalidity and then in the light of the authorities.

The proposition theoretically considered assumes a wider and more fundamental aspect, for the proposition is contrary to the conception of justice. Theoretically we know that this whole social existence and fabric of humanity is impossible without the evolution and dominance of the sentiment and idea of justice. The concept of justice as I have elsewhere shown[10] postulates *jural freedom,* i. e. equality before the laws, or to put it in another way, justice requires pre-existing rules of law applicable to all alike and impartially applied in adjudication. If no rules exist, or if the government is not bound to apply them impartially, even against itself, when its tribunals are adjudicating men's rights, justice does not exist nor do laws exist. All the philosophical jurists have recognized this fundamental fact as self-evident. It was known long before the proof was made that justice was a necessary evolution of the social state. Men arrived at it, just as any reasonable man can now arrive at it, by simply examining his own consciousness, without the help of any great logical or dialectical or philosophical apparatus. While Aristotle had dreamed of a state ruled by law, Cicero, so far as I know, first laid down the requirement in exact words: "Justice requires that in equal cases there should be an equal law."[11] As Stanley Matthews expressed the thought in

9. *Loan Association* v. *Topeka,* 20 Wall. 655.

10. See Michigan Law Review, XVI, 304 et seq., where the concept justice is analyzed as an evolutionary development. In that article I made use to some extent of the analysis of *René Demogue* ("Les Notions Fondamentales du Droit Privé," translated Modern French Legal Philosophy, pp. 480-524), but he does not apparently discriminate between true justice which is equality before the law and the modern notion of political justice which is concerned with forms of government; nor does he recognize that equality before the law postulates jural freedom which is a totally different thing from democracy.

11. Topica, 23: "Valeat aequitas, quae paribus in causis paria jura desiderat."

constitutional form: "The equal protection of the laws is a pledge of the protection of equal laws."[12] And again: "Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case."[13] It is this general basic proposition that jurists who have not the practical training of lawyers are continually forgetting, while the present so-called sociological jurists[14] do not even know that social existence or any state (universitas) is impossible without some approach to the rule of justice.

It is also true that the creation of a rule for the future is an act of legislative power clearly so recognized by our highest court with the assertion added that no court can assume either legislative or executive power.[15] The principle of justice was also found after long ages of experiment and failure to require that the judicial power must be separately and independently exercised. It cannot be mingled with the executive or legislative power. The spheres of operation of the three powers are essentially different. It makes no difference what kind of a body exercises the power, the nature of what is done determines whether a proceeding is legislative or judicial.[16] Judicial action can take place only upon a *past* state of facts. Legislation can establish only rules for the *future*. Executive action is concerned solely with the *present*. Our Supreme Court through Justice Holmes himself has made it plain that whether a rule shall exist for the future is a legislative power, and that litigation cannot arise *"until the moment of legislation is past."*[17] There may be illogical, uncouth, and unjust exceptions in practice,[18]

12. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369.
13. *Hurtado* v. *California*, 110 U. S. 516.
14. The term is a very unfortunate one. A jurist is necessarily a sociological jurist, but the term as applied means those jurists who think that the interests of the individual and therefore the interest of society should be sacrificed for the interests of a class.
15. *Honolulu Transit Co.* v. *Hawaii*, 211 U. S. 282, may serve as a late decision.
16. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, per Justice Holmes.
17. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 228, 229. It is curious that Justice Holmes cannot see that his own opinion in the case just cited proves that his whole philosophy of law is indefensible and proves that courts do not make law and in the nature of things cannot do so.
18. Retroactive laws are always unjust. Curative acts are not unjust since they cannot make a void act valid. A legislative divorce, an ex post facto law, a bill of attainder or of pains and penalties are necessarily unjust. Rules of court while legislative in a sense where they touch substantive law apply to the future. Remedial changes speak to the future, even when they affect existing actions. Declaratory judgments are truly adjudications. There exists no reason why executive power should not regulate all executive departments. It is only an accident in our history that legislation occupied this field. Executive departments applying legislative or judicial power

but analysis shows that when a legislature adjudicates it assumes a judicial power and when a judicial body assumes to make rules for the future or to create a rule not existing as a rule when the transaction adjudicated happened, it is assuming a legislative power by attempting the impossible feat of projecting its rule for the future backward to govern a past state of facts. If a man cannot see that it is psychologically impossible to govern a completed transaction by a rule invented after the transaction happened, he ought at once to correct his ignorance of the rules of thinking, or be condemned to practice under the Swiss code. If by edict of legislature, court, or executive, a rule can be established to furnish a substantive rule of law to govern a past transaction and changing in any way the substantive rule then applicable, it is plain that jural equality and freedom are violated and for that instance law does not exist.[19] It is impossible to analyze the concept of justice as it has arisen and been developed from the necessity of men living in a social state, without recognizing that if the government, in its judicial capacity in adjudicating between the citizen and the government that represents the whole body, does not follow the then applicable rules of law, justice does not and cannot exist. So much is to be said for theoretical conclusions, and these theoretical conclusions have been the orthodox doctrine of our Supreme Court.

These theoretical considerations consecrated by the best thought of the ages will not appeal to those who have not gone far enough into the science of government to know that all arbitrary power is bad and is merely another name for class government, which is an unmitigated evil no matter how large the class may be.

---

present a different question. One matter that ought to receive attention is the question of martial law and the distinction between martial law and military law. The case of *Ex parte Milligan*, 4 Wall. 2, is a most confused deliverance, which needs revision. The sole question as to martial law is as to the method of declaring it. Military law on the other hand is a very different matter. But in the general field of discrimination of governmental powers there will be many situations that are on the border line. Statutory rules making certain facts prima facie proof of a certain crime or liability must have some rational connection between the rule and the fact. But I would like to see our Supreme Court confronted with a statute declaring the presumption to be that all indicted persons were supposed guilty until proven innocent. The court would have some difficulty in explaining some of its decisions.

19. It is a fundamental necessity that is constantly ignored by most legal philosophical writers. Long ago St. Augustine said: "Where there is not true justice, law cannot exist" and "where there is not true justice a state (societas), an association of men in the bond of law, cannot possibly exist." "De Civ. Dei," xix, 29. For his definition of justice St. Augustine accepted the orthodox Roman concept of jural equality and freedom.

II

The great stimuli to current thought since the beginning of the great war are in no department of knowledge more active than in political and legal thought. International law suddenly gained an importance in the search for a theory to demonstrate its binding force. The old exploded dogma of the divine right of kings, which in the German Kaiser seemed a ludicrous anachronism, became an immanent menace to the world. The apparent breakdown of free democratic governments, their seeming feebleness and incapacity, their painful promotions of garrulous and demagogic mediocrity to places of power requiring high capacity, the lack of concentration and decision commonly displayed by popular government, caused thinking men to recur to the words of our supreme dramatist:

> "And strength by limping sway disabled,
> And art made tongue-tied by authority,
> And folly (doctor-like) controlling skill,
> Tired with all these for restful death I pine."[20]

It is because the time is what it is, because "now is the judgment of this world," that such a statement as that no government can give law to itself, that the government in its judicial capacity is not bound by the laws, must be given a close scrutiny. If it be true as Justice Holmes says in another place, as a corollary to the proposition that no laws bind the state, that the government under the police power *can enact as law whatever is held by "strong and preponderant opinion,"*[21] whereas our Supreme Court has said that there are rights of the citizen which are beyond "reach of the state" and which are "not subject to the absolute disposition and unlimited control of even the most democratic depositary of power,"[22] if we hold our rights and our property at the mere sufferance of "strong and preponderant opinion," we have reached in the domain of legal thought, a very dangerous stage. But when we find the originals vouched for what Justice Holmes asserts to be "public knowledge since before the days of Hobbes," we shall see that the ancestors invoked would be the first to repudiate their alleged descendant.[23] I shall prove that the great thinkers of the past have held a very different language.

20. Shakespeare, Sonnet lxvi. It may be of use to say that "doctor-like" is not an unkind reference to the medical profession, but the word is used in its old sense of *teacher*.

21. *Noble State Bank* v. *Haskell*, 219 U. S. 104.

22. *Loan Association* v. *Topeka*, 20 Wall. 655.

23. To comprehend why it is that Justice Holmes should have made his remarkable statement it is necessary to study him as a human document.

Professor Vinogradoff, who though a Russian, holds the

Some of his legal writing is entitled to be called classic. His book on the "Common Law," when I first read it, seemed the most interesting law book I had ever seen, although many of his generalizations are hasty and ill-founded. (See *Wigmore*, "Responsibility for Tortious Acts," Harvard Law Rev., VII; *Pollock* and *Maitland*, II, 526, 528.) His "Private Addresses" contain some of the noblest words ever spoken upon our profession. His opinions are always interesting. Their directness and brevity, the life, grace and animation of his style, so different from the dull, heavy, wooden "judicialese," make them always attractive. He is a master of epigrammatic expression, of vivid and illuminating thought, but epigrams, unfortunately, are either half-truths or not truths at all. He is never merely the lawyer, he is always a man of letters. Then, too, it would be difficult to find such unvarying and genial courtesy and what the Latins called "urbanitas," the cultivation of a genuine man of the world. The remarkable amount, ease and celerity of his work is astonishing. One is constantly reminded of the Frenchman's remark on Mansfield, "il s'amuse à juger." There is something distinctive in all his work. Even in opinions by other judges we can catch now and then an addition by Justice Holmes. When he entered our Supreme Court he seemed a new kind of judge. Against a statement of Judge Story he quoted *Holtzendorff's* "Rechtslexikon" in an opinion which is certainly wrong. *American Colortype Co.* v. *Continental Colortype Co.*, 188 U. S. 104. In *The Elisa Lines*, 199 U. S. 119, he cited *Windscheid's* "Pandekten." He has made many other references to German legal works in his opinions. In *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, reversing a court composed of Justices Day, Severens, and Lurton on the question of whether a circus poster was copyrightable, he is simply coruscating. He quotes Ruskin, refers to Velasquez and Whistler, the etchings of Goya and Rembrandt, the paintings of Manet and Müller's engraving of the Sistine Madonna as illustrations. He even refers to those personable and shapely ladies of the ballet who figure in Degas' paintings. It is a fine example of "the true, the blushful" legal Hippocrene. Justice Harlan was so stupefied that he could dissent only by quoting the opinion of the lower court. We are reminded of the Attorney General of England in the famous libel suit of *Whistler* v. *Ruskin*, the most laughably absurd thing in legal literature. The soggy and stodgy Attorney General is cross-examining Whistler. There is up before them one of the most elusive of Whistler's paintings, the falling rocket at the Cremorne. The Attorney General asks in obvious good faith: "Now, Mr. Whistler, could you make me see the beauty of that picture?" Whistler studied his questioner's countenance carefully, looking him over speculatively during a long pause and answered confidentially: "No, do you know I fear it would be as useless as to pour music into the ear of a deaf man." ("The Gentle Art of Making Enemies," p. 10.) The best that can be said for the legal work may be found in such articles as *Wigmore's*, Har. Law Rev. XXIX, 601; *Dobyns*, Ill. Law Rev. XII, 71, and *Frankfurter's*, Har. Law Rev. XXIX, 683.

Justice Holmes, more is the pity, seems to be a pronounced disciple of the school of Austin, that most barren of all the schools. He has quoted *Gray's* "Nature and Sources of Law" as an authority! He has made *Dicey's* "Law and Opinion" a basis of legal argument! He accepts without critical examination the English theory of sovereignty requiring an irresponsible power in the state. He consequently seems to be totally out of sympathy with constitutional limitations, and he seems to cherish a particular antipathy to the Fourteenth Amendment. The fact is that he has a bad philosophy of law, he believes that courts can and do make law, yet in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, he shows that he knows that courts cannot make law. He does not recognize that the teaching of history is that there should be no uncontrolled power in the state, that the English theory of sovereignty set forth in *Sir Frederick Pollock's* "History of the Science of Politics" is as much opposed to the true science of government as are the gyrations of the Russian Bolsheviki. When the Supreme Court held that the taxing of personal property never in a state, but permanently located and used in

Corpus Professorship of Jurisprudence at Oxford, stated in his

another state, was a taking of property without due process of law, he wrote a separate opinion to say he could not see what the Fourteenth Amendment had to do with the question. Yet most reasonable men would say that if taxation is due process, a taxing of property which the taxing power cannot tax is not due process of law. In *Adair* v. *United States*, 208 U. S. 161, 190, in *Coppage* v. *Kansas*, 231 U. S. 1, 16, in *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, he dissented in plain cases. As a true Austinian he has very exaggerated notions of the powers of legislation, and as to public opinion he seems to think that every now and then a tub should be thrown to the popular whale at the expense of the constitution. For him what large numbers of people think, even though it be wrong, as he admits, is a very good basis for overriding the Fourteenth Amendment under the police power. For instance he has said in *Noble State Bank* v. *Haskell*, 219 U. S. 104: "It [the police power] may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or *strong and preponderant opinion*." I cannot understand why the court subscribed to this unless as it was said of Pericles, "the goddess of persuasion sits upon his lips." Most lawyers have supposed that the contitutional guaranties exist to protect the citizen against "strong and preponderant opinion." The Chief Justice has used exactly that thought in words I have quoted above. No more dangerous doctrine can be imagined as a test of the police power. But what is "strong and preponderant opinion"? Who knows it? Who can certify to it? How could Justice Holmes or any one else find what was "strong and preponderant opinion" in Oklahoma or even adumbrate what moved the legislature? Laws are generally passed by minorities, not by majorities. And what an extraordinary application is made in that very case of "strong and preponderant opinion." He justifies the Oklahoma law as to a guaranty fund exacted from all state banks to protect depositors, by the statement that "strong and preponderant opinion" believes that such a fund conduces to "the possibility of the payment of checks drawn against bank deposits," and thus "assists the currency of checks" as an ordinary and usual substitute for money. *But this is a complete error.* The fund is to pay depositors, not holders of checks. It cannot assist the currency of checks. The man who takes a check relies solely upon the drawer. Unless it be in some outlandish district, the payee or holder of a check never gains any right against the bank until acceptance. A check is not an assignment pro tanto of a deposit. If the bank fails, the check outstanding is not paid from the fund. The fact is that Justice Holmes was mixing the idea of the old state funds to protect creditors of the bank holding mainly bank notes, with the purpose of this new, "hayseed" fund, whereby good bankers were called upon to contribute to a fund to protect the depositors of a poor or dishonest banker. The fund that would protect the currency of checks would be a fund to pay the checks of those who draw checks against "no funds." But we may suppose that this sort of fund would not be possible under the police power in even Oklahoma or Texas. We may well doubt whether "strong and preponderant opinion" in the most Bryanized community does not know the difference between a bank note and a check. It may be that there is some reason for the police power creating a bank guaranty fund to protect depositors, but certainly it cannot be the reason given, nor can any other reason be found in the opinion. This case shows one defect of his mind, and that is that he works with such celerity that he does not think through a difficult matter to the end, nor does he always examine his authorities with scrupulous care, as the sequel will show.

Now and then, however, Justice Holmes comes out as a strong defender of constitutional limitations. No one can complain that he does not seek always to insure fair dealing, nor that he has not a high ideal of life and of law. He is too widely read to cherish any confidence in the varied legislative and sociological nostrums to regenerate the world. The sanctity of contracts is a cardinal object of faith with him. I confess that his varied and Protean phenomena, constantly shifting with his wide and omnivorous reading, were baffling until I found in one of his dissenting opinions, *Loch-*

presidential address to the Legal Section of the Congress for Historical Studies held in London in 1913:

"There are streams of doctrines and institutional facts which pass through the ages and cross national boundaries from one historical

---

ner v. *New York,* 198 U. S. 45, 76, this statement, which absurdly enough has been selected by Mr. Frankfurter for special commendation: *"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."* Since the only legal judgments that are given are in concrete cases, it follows that he asserts that lawsuits are not to be decided by general propositions of law, but by means of a "more subtle intuition." This sounds like the unconscious self-satire of the Biglow Papers:

"Ez to my princerples, I glory,
In hevin' nothin' o' the sort."

At last we can strike our finger on the place and say: "Thou ailest here, thou dost not know what justice is." If this is his theory of deciding cases, he has again been led astray by a bad philosophy of law. If a judgment applied to a concrete case, i. e. a past state of facts, is not based upon a rule of law existing when the transaction happened, the fundamental notion of justice is, as we have seen, violated. The rule of law must be a major premise, the minor premise must be a statement of facts governed by the major premise, or there is no such thing as a legal adjudication. (See Michigan Law Review, XVI, 338.) If a judge may dismiss in any concrete case the necessity for deciding in accordance with a general proposition of law applicable to all alike, there is no such thing as justice. If the judge need not after settling the facts find a general proposition or rule which is the major premise, he is not adjudicating nor is he legislating, for legislation applies to the future and not the past. If the judge may trust to his "more subtle intuition" in one case, he may follow it in any case. As a matter of fact every judge does look for his major premise and the lawyers argue to tell him what it is. But it is because Justice Holmes sometimes, but rarely, and then only when he desires to smite his bête noire, the Fourteenth Amendment, follows his "more subtle intuition," that he does not reach on his own statement anything so "articulate" as a rule of law. Hence in *Adair* v. *United States,* 208 U. S. 161, 191, he dissented saying that it was proper to pass a law under the police power to compel all laboring men to belong to unions. He sees nothing wrong in boycotting and picketing. In *Coppage* v. *Kansas,* 231 U. S. 1, 16, he says that a test of the police power *is a reasonable laboring man's belief,* that if a reasonable man may believe that only by belonging to a union can he receive a fair contract of employment, whether that belief be right or wrong, the law under the police power can force employers to deal only with union men. But "strong and preponderant opinion" is that the laboring men are wholly wrong if they cherish such a belief. A still "more subtle" and more reasonable intuition should have told Justice Holmes that he was not dealing with the employers but with those greater numbers of laboring men who do not desire to belong to unions, who do not wish to be directed by the sort of people who govern the unions, who ask simply that the laws or union violence shall not coerce them into the unions, which are in many ways destructive of the progress of labor and hostile to its best interests. Their rights would be sacrificed by a legislative edict more destructive than the torch of Omar, a result which the Supreme Court has as yet happily averted from us. But it is this bad philosophy of law that so often causes chagrin to the true admirers of Justice Holmes, when they find him supporting wholly untenable and destructive propositions.

But a man may be a great and useful judge who has a very poor philosophy of law, if he will only keep it out of his opinions, and this Justice Holmes usually does. But is it not a pity that "many are called, few are chosen," and that Justice Holmes with all his great learning and splendid gifts just falls short of what as a judge he might have been?

formation to another. These constitute what may be called the current of cultural tradition."[24]

Such a line of cultural tradition begins with certain phrases of Ulpian incorporated in Justinian's Digest, and this cultural tradition has been striving for ages to repudiate and destroy the alleged principle of Justice Holmes.

Ulpian says that what has pleased the emperor has the vigor of law ("quod principi placuit habet legis vigorem"). This is considered the original legal statement of absolute power of the ruler, but it must be taken in its connection. The whole phrase is (Digest 1, 4, 1): "What has pleased the emperor has the vigor of law, because by the lex regia which was passed concerning his rule, the people confided to him and conferred upon him all his sway and power." The reason for the situation is given by Pomponius (Digest 1, 2, 2, 9) that the people could not be gotten together (in the "comitia centuriata" or "comitia tributa" or the council of the plebs) and the senate was first used as a legislative body, but later the power of legislation was given to the emperor. Gaius (Inst. 1, 2) says that it was never doubted that a constitution of the emperor served the place of law ("legis vicem"), since the emperor received the empire by a lex. Theoretically, of course, the emperor was elective; and power of legislation was given to him by the people, it is stated in another place, because it was impossible for either people or senate to exercise the power (Digest 1, 2, 2, 11). Finally the Code states (1, 17, 1, 7), in the language of the compilers, that by an ancient law which was called *regia*, all the right and all the power of the Roman people was transferred to the emperor.

The point is that the Digest and the Code recognized that all legislative power emanated from the body of the people, and that the creation of law was either by the popular assembly, or by the quasi-representative senate, or by the long custom of the people. The Digest states (1, 3) the laws are leges, senatus consulta, or longa consuetudo. The different kinds of law are accurately expressed in a quotation used by Lord Mansfield in a celebrated utterance:

"Vir bonus est quis?
Qui consulta patrum, qui leges juraque servat."[25]

24. "Essays in Legal History," edited by Vinogradoff, Oxford, 1913, p. 4. This book incorporates the essays read at the Congress.

25. *Horace*, "Epistles," i, 16, 40. Judges would do well to remember the preceding lines:

"Falsus honor juvat et mendax infamia terret
Quem nisi mendosum et medicandum?"

"Who is the upright man? He who keeps the decrees of the fathers, the legislation and the customs." This distinction comes into our law as Glanville's and Bracton's leges and consuetudines. This theory of the Roman law is wholly contrary to absolutism. All that Ulpian intended to say is what we should say of our own executive legislation, it is not a *lex*, but it has the vigor of a *lex* by reason of necessity and popular consent. When we talk in this way we are not absolutists any more than was Ulpian.

The next phrase in Roman law to be noticed is, "princeps legibus solutus est," the emperor is freed from the laws. "Peu de textes ont exercé une influence plus profond sur le développement du droit public dans certains pays d' Europe et surtout en France."[26] But the phrase in Roman law had a limited and a precise meaning. The emperor was not freed from the laws, he was subject to them in principle. But it happened that such and such a new law exempted the reigning emperor from its provisions because they were not applicable to the head of the state. The senate was competent to this legislative declaration. The "Lex de Imperio Vespasiani" by a general expression exempted Vespasian from the laws that did not bind his predecessors. By the time of Ulpian the emperor could himself exert the same power. But these exemptions were from matters of private law not applicable to the head of the state, and the phrase especially applied to matters of police. The emperor remained bound by the laws concerning public law and the criminal laws, as well as all private laws governing private rights of citizens.

The next text of a much later time is in the Code (1, 14, 4), a rescript of the Emperors Theodosius II and Valentinian III, the famous "Digna Vox" that appears through Baldus in Justice Holmes' decision: "It is a saying worthy of the majesty of the ruler that the emperor should acknowledge that he is bound by the laws, for upon the authority of the law our authority depends, and in truth it is more advantageous for the empire that the principate should be subject to the laws."[27] Can anything be more contrary to the sense of this passage than to claim that a commentary upon this phrase proves that the government which creates the law is not bound by the law which it creates?

We now come to Justinian, under whom the Code and the

26. *Esmein*, "Le Maxime Princeps Legibus Solutus Est," "Essays in Legal History," Oxford, 1913, p. 201. ("Few texts have had a deeper influence upon the development of public law in certain countries of Europe, and especially in France.")

27. "Digna vox majestate regnantis legibus alligatum se principem profiteri; adeo de auctoritate juris nostra pendet auctoritas et re vera majus imperio est submittere legibus principatum."

Digest were compiled. While the Code in the language of Justinian (1, 17, 1, 7) admits that the emperor's power has been bestowed upon him by the Roman people, we find that the empire is now a Christian state; and another idea is creeping in, that the emperor's power comes from God, and that his authority has been delivered to him from Heaven.[28] The idea arises from an uncritical use of the Apostle's figurative language. The Apostle said: "The powers that be are ordained of God, for there is no power but of God. Therefore he that resisteth the power withstandeth the ordinance of God."[29] It is not necessary here to show how this saying arose and how St. Paul was combating the charge that the early Christians were enemies of the state and secret conspirators against the law. But this is the origin of the divine right of kings.

The great Fathers of the Latin Church were the saints, Ambrose, Augustine, Jerome, and Gregory the Great. While they are all touched with the idea that the ruler's power comes from God, yet they cling to the conception of the Roman law, a state bound by and governed by the laws. "If justice be taken away," says St. Augustine, "what are governments but great bands of robbers? What are in fact bands of robbers but small states?"[30] Listen to the great Father, St. Ambrose, as he writes rebukingly to the emperor: "Have you not given laws and can any one judge otherwise than by them? What you have commanded to others you have commanded even to yourself, for the emperor makes the laws and he must be the first to observe them."[31] St. Augustine truly says: "As to the temporal laws, although men decided as to them when they were made, yet when they are once made and published it is not permissible to judge otherwise than according to them."[32] They reach the exact question which we are concerned with here. St. Ambrose playing on the double meaning of the Latin "solvere" asserts: "The king is not freed (solutus) from the laws, but he pays his debt to (solvit) or fulfills the laws by his own example

28. "Deo auctore nostrum gubernantes imperium quod nobis a caelesti majestate traditum est."

29. Romans xiii; see also Peter I, ii, 13-17.

30. "De Civ. Dei," iv, 4. "Remota atque justitia quid sunt regna nisi magna latrocinia? Quia et latrocinia quid sunt nisi parva regna?" For a number of references herein below extending to the twelve hundreds I am indebted to the "History of Mediæval Political Theory" by the Carlyles. Such work persuades us that Oxford is the place in the world of best scholarship.

31. Epistles, xxi, 9: "Immo etiam dedisti leges nec cui esset libitum aliud judicare? Quod cum praescripsisti alio praescripsisti et tibi. Leges enim imperator fert quas primus ipse custodiat."

32. "De Vera Religione" 31.

of obedience."[33] Another great authority whose writings were an encyclopedia of knowledge for ages, St. Isidore of Seville, is no less pointed: "It is just that the prince should obey his own laws. For the authority of his voice is just, only if he is not permitted to do what he has forbidden to the people."[34] This is far better legal doctrine than that the government in adjudicating is not bound by its own laws. The current of "cultural tradition" is brought down to St. Isidore, who died in A. D. 636. Even in this age of absolutism the voices of the great and the good speak in the spirit of the Roman law.

A later churchman, one of the great writers of his age, Hincmar, Bishop of Rheims, who began life under Charlemagne and died A. D. 882, after quoting and endorsing St. Ambrose as above, says: "Therefore the just laws promulgated either by the people or the prince are to be vindicated justly and reasonably in every case whatever."[35] And he repeats the idea: "Kings and state officials have laws by which they ought to rule in every province; they have the laws of Christian kings, their ancestors, which have been promulgated by the general consent of their faithful lieges to bind *all equally*."[36] The idea was now reappearing that the popular consent is necessary to establish law. The "Edictum Pistense" of Charles the Bald in A. D. 864 recognized both the legislation and customary law, when it recited: "Law is made by the consent of the people and by the institution of the king"[37] and the ruler in that document acknowledged that he was bound by the laws and promised to obey them. No one disputed the truth that laws bound the king. St. Isidore had said: "He does not rule who does not rule rightly; therefore the name of king is held on condition of doing right and is lost by wrongdoing."[38]

It is now necessary to revert to the essential idea of justice as a great cultural tradition of equality before the law. I have quoted Cicero's "Topica" above. He shows his realization of the fact that without the formative and controlling idea of justice embodied in law the social state is impossible by saying: "Nothing certainly is

33. "Commentary on Daniel": "Nec legibus rex solutus est sed leges suo solvit exemplo."

34. "Sententiae," iii, 51.

35. "De Reg. Per.," 27: "Igitur aut a populo promulgatae justae leges servandae aut a principe juste et rationabiliter sunt in quolibet vindicandae."

36. "De Ord. Pal.," 8: "Habent enim reges et reipublicae ministri leges quibus in quacunque provincia degentes regere debent, etc."

37. "Etenim lex consensu populi et constitutione regis fit."

38. "Etymologies," ix, 3: "Non autem regit qui non corrigit. Recte igitur faciendo regis nomen tenetur, peccando amittitur."

more ennobling than for us to plainly understand that we are born to justice and that law is instituted not by opinion, but by nature."[39] There is a peculiarly modern tone in his saying: "If the fortunes of all cannot be equal, if the mental capacities of all cannot be the same, at least the legal rights of all those who are citizens of the same state ought to be equal."[40] All the great Roman lawyers of the Digest recognize that justice presupposes jural equality and freedom. Ulpian, Tryphonius, Florentinus are certain that liberty and equality are the demands of natural law.[41] Ulpian asserts: "By natural law all men are equal" (Dig. 1, 17, 32), "By natural law all men are born free" (Dig. 1, 1, 4), and "Liberty is the power given to every one to do whatsoever is not prohibited by law" (Dig. 1, 5, 4). The Digest opens with the statement of Ulpian copied by Bracton: "For, as Celsus finely defines law, it is the science of the *good and equal,* whose priests some one has called us, for we worship justice and we profess the ***knowledge of the good and equal, which distinguishes the just from the unjust***" (Dig. 1, 1, 1). As our equity maxim has it, equality is equity or justice. "Justice is the constant and perpetual willingness to render to every one his right" (Dig. 1, 1, 10). Thus justice becomes a duty "to live uprightly, not to injure another, and to render to every one what is his due."

The saints agree with the lawyers. St. Gregory the Great lays it down that "by nature all men are equal."[42] Ambrosiaster is no less specific: "God did not make slaves and free men, but all of us are born free."[43] The thought of the compelling necessity of equality was never better put than in the language of religion and morality by the Elizabethan Hooker:[44] "For seeing those things which are equal must needs all have one measure; if I cannot but wish to receive all good, even as much at every man's hand as any man can wish unto his own soul, ***how should I look to have any part of my desire herein satisfied, unless myself be careful to satisfy the like desire which is in other men?***" This is the whole secret of the sentiment, the idea, the concept of justice, and this shows why society cannot exist without it. Its dictates therefore become natural law, as St. Isidore improving on Ulpian's famous passage[45] says: "Things required by natural law are marriage, succession, bringing

39. "De Leg.," i, 10.
40. "De Rep.," i, 32, 12.
41. Dig. 1, 5, 4; 12, 6, 64.
42. "Omnes namque homines natura aequales sunt."
43. "Comm. on Coloss.," iv, 1.
44. "Ecclesiastical Polity," I, 8, 7.
45. "Etymologies," v, 4. Compare this with Ulpian (Dig. 1, 1, 1), the passage so much criticised by Austin. See Michigan Law Review, XVI, 292.

up of children, *one common security for all, one liberty for all, and the right to acquire those things which are capable of possession in air, earth and sea.*" These words are written in the Canon Law of the Church. It comes almost as a rebuke to our presumptuousness to find that an opening phrase of our Declaration of Independence is practically copied from a good old Catholic saint of the Dark Ages who got it from the Roman jurists. But I hope that it is not necessary to repeat that this concept of jural equality has nothing to do with our modern assertion of liberty and equality as concerned with political arrangements as to suffrage and like matters.

But at the same time there came in the stream of cultural tradition the most pernicious of the generally diffused popular ideas. The conception that men once lived in a legendary golden age, and can again reach that blissful stage by simply abolishing government and law and property, will never down. Not to speak of the Greeks, the great Roman poet Lucretius knew better. He pictured the actual history of mankind as it had happened.[46] St. Isidore borrowed the thought from him: "For at first men were naked and unarmed and helpless against wild beasts, without any protection against cold, without any way to preserve heat, nor were men safe from one another."[47] Alcuin (735-804) also has the thought: "For there was a time, it is said, when men wandered like beasts here and there over the earth and without any power of reason at all, but everything was determined by bodily strength."[48] But the idea of a golden age made so prominent in Seneca coalesced with the idea of the early Christians that men though originally good had fallen from their high estate. The inference from this thought was that laws and institutions and governments were rendered necessary by the fall and were evils, that if men were let alone without laws they would assume their ancient condition of peace and goodness. Gregory VII in his contest with the German emperor used almost this language. How this was reconciled with the idea that law was natural and necessary, that governments and powers were ordained of God we cannot see. But this old idea is constantly recurring in new shapes. It is the basis of the doctrine of anarchy, as well as of communism and socialism, and the phantasy of the dangerous doctrinaire dream that democratic government will run itself, and that

46. "De Rerum Natura," the latter part of the fifth book.
47. "Etymologies," xv, 2.
48. "Nam fuit, ut fertur, quoddam tempus cum in agris homines passim bestiarum more vagabantur, nec ratione animi quidquam sed pleraque viribus corporis administrabant."

it is possible among any kind of people and not alone among a population trained to the highest levels of social adjustment, imbued with the conceptions of justice and equality before the laws, and thoroughly hostile to class government. But strange as it is, this idea of man's natural perfection is constantly meeting the natural law and equality idea and interfering with its development by proposing some new nostrum of robbing one class for the supposed benefit, but really the injury, of some other class.

III

Passing from the age of Charlemagne and his successors we reach the first jurists after the Roman lawyers in the revival of Roman law. The world of Europe by the eleven hundreds had begun to live again after the first horrible onslaught of Germanism that had practically destroyed civilization by the barbarian invasions. The Glossators, so-called, were exceedingly uncritical men because they had not the knowledge necessary to judge of the Roman law. They thought that the Pontifex Maximus was the Roman pope. Irnerius, called in his day "the lamp of jurisprudence" ("lucerna juris"), Placentinus, who founded the still existing law school at Montpellier, Azo, "dominus dominorum omnium legis," and the great Gloss of Accursius repeat the phrase of Cicero as to equality before the law being necessary to justice. The "Fragmentum Pragense" which is somewhat older than the Glossators, defines justice as a perpetual willingness to render to each man his due, which, when reduced to precepts or commands, either written or customary, is called law. But now the lawyers were meeting difficulties in conflicts between the different kinds of law. Especially the revived Roman law is found to be in conflict with the customary law of the various small social aggregrates in Italy. Groping after some rule the "Petri Exceptiones" in the prologue assert that "if anything is found in the laws that is useless, unobserved or contrary to equity, we stamp it under our feet." The difficulties were increased by the fact that each man wherever he was, claimed the law of his race or origin and territorial law was taking the place of personal law. Azo and Pope Gregory IX agreed that custom can make, abrogate, and interpret legislation (lex). Irnerius says that "society (universitas), that is, the people, has the duty of lawmaking in order to provide for individuals as members of society. Hence it happens that the commonwealth makes laws and interprets them when made, since the law defines what each man ought to

do or not to do."[49] Azo says that the people gave the emperor the power to legislate and they can resume it again,[50] and Hugolinus agrees with him. Azo says, too, that the emperor can make law only in a certain way with the consent of his chief officers and senate. Pillius and Irnerius have reached the plane of due process of law. They assert that "the emperor cannot annul a sale, or a will or a donation, he cannot confer a monopoly, he cannot do anything contrary to right (jus) and law (lex). He cannot give judgment without hearing both sides."[51] The ruler is not only bound by the law, but there are also certain fundamental things that he cannot change by legislation.

St. Isidore quoting Ivo of Chartres, a great canonist, had found the same difficulty of conflicting laws: "A law shall be honest, just, possible, according to nature and the custom of the country, convenient to the time and place, plain, written not for some private advantage, but for the common benefit of the citizens."[52] He seems to think that customs or legislation which do not meet those requirements are not law.

The next actual statement of a body of law that we have is the Assizes of Jerusalem compiled by the feudal chiefs when they conquered Palestine. By this time the feudal system had extended over Europe, and these laws are a fair representation of the ideas of feudalism. They lay it down as law that no feudal lord has the right to withhold what the law requires and adjudges, for he has sworn to observe all the laws and customs and to do justice to all men, rich and poor, high and low, and neither men nor people ought to permit any departure from the law, for the lord is not lord to do injustice.[53]

The old treatise "Jostice et Plet"[54] of this time says emphatically: "The prince is not above the law, but the law is above the prince, for the laws give to him whatever privilege he has." This is almost the language of the Code and of the Roman law. Law, it is plain, is being studied to some effect in continuing the great stream of cultural tradition even in the iron age of feudalism.

The next great authority of the Middle Ages is John of Salisbury, who had been the secretary of Thomas à Becket until the

49. "De Aequitate," 2.

50. "Summa," i, 14, 8. This is the book that Bracton used for his Roman law.

51. Irnerius, vii, 27, 3.

52. "Etymologies," V, 21.

53. "Assizes de la Cour des Bourgeois," 26.

54. I, 2, 3.

sainted archbishop was murdered by the knights of Henry II. He wrote a great book called "Policraticus" or The Statesman. It is far greater than Machievelli's book. He points out the difference between a tyrant and a king as being that the king obeys the law. He quotes the famous "Digna Vox" (Code 1, 14, 4), and adds that a true king thinks nothing lawful for himself that is *contrary to the equality of justice*. He makes a savage attack upon those "dealbatores potentum" (whitewashers of the powerful), who whisper that the king is not subject to the law and that what pleases him, not only what is determined according to the *form of equality*, but what is otherwise, has the vigor of law. But, he adds, such a king whom they enfranchise from the bonds of law they really make an outlaw (ex lege).[55]

Between John of Salisbury and Bracton comes Magna Charta extorted from King John. It is evident that it merely embodied the prevalent ideas of the age upon law. It bound the king to govern by the laws. It pledged him that his courts should not deny or delay justice, and that no one should be proceeded against unless by the judgment of his peers and (*aut*) the law of the land. For us it is the classic statement that the government must obey the laws. The idea that the community must assent to the law before it is bound by it was already in existence. Gratian in the Canon law[56] says that no law is valid by whomsoever promulgated unless it is accepted by the custom of those concerned. He says that even the pope, God's vicar upon earth, is bound by the laws. He recognized that laws were abrogated in his day because contrary to the custom of the users. The Sire de Beaumanoir in France, a contemporary of Bracton, states the law to be that all princes are bound to keep and to cause to be kept the laws; they are determined by custom, proved in two ways, first, by the general assent of the whole country, or, second, by judgments of courts if the custom has been the subject of litigation.[57] This wise old man knew that judgments did not make rules of law, but were proof of rules. And this has always been the orthodox belief of the law, since it allows when rules of law are to be proven, the use of court decisions as evidence. But it ought to be plain that what is evidence to prove a rule is not the rule itself, nor does it make the rule. Glanville in his prologue uses the language of Beaumanoir, while Bracton, about 1260, adds that when laws have been approved by the consent of the users and

55. "Policraticus," iv, 7.
56. "Decretum," iv.
57. *Beaumanoir*, "Coutumes de Beauvoisis," xxiv, 682.

confirmed by the oath of the king, they cannot be changed or destroyed without the common consent of all those by whose advice and consent they were promulgated.[58] He insists that customs are just as much leges, for although not written, they have the vigor of law ("legis vigorem").[59] English historians, were they acquainted with their legal literature, would not be compelled to hunt far to find the reason why Simon de Montfort at this time called into being the first English parliament by summoning burgesses and knights of the shire along with the prelates and barons, a representative device that had been used for many years by the Norman English judges in requiring full representation of the shire in their proceedings on the eyre. Bracton is no less emphatic as to the rule of law. He is writing in the midst of the barons' war upon King Henry III to compel him to respect the law. "The king has superiors who are God and the law which made him king and if the king should be without a bridle, i. e., the law, a bridle ought to be put upon him."[60] He lays down the principle that there is no law where will and not law governs, and while the king ought to be under no man, he is under God and the law, because the law makes the king.[61] Therefore the king must attribute to the law what the law gives the king, rule and power; and the king's power is restrained by the law which is the bridle of power.[62] This is the classic language of English juristic thought from Bracton, through Fortescue and Coke to the revolution of 1688. It is true today, when we substitute the government for the king.

Now, first arose the doctrine that the king could not be sued in his own court, which is the original of our principle that the sovereign cannot be sued without its own consent. This was not true originally, for every feudal lord could be sued in his own court, but Bracton states that the king being the fountain of justice cannot be sued in the assize, that the remedy is by petition that he correct his act, and if he will not do it, let it suffice that the Lord hath said: "Vengeance is mine, I shall repay"; or (*and note the point*) the commonwealth and the baronage ought to correct the act in the court of the king himself.[63] He adds that in receiving justice

58. *Bracton,* "De Leg. et Cons.," i, 2, 6.

59. *Bracton,* Id., i, 1, 2.

60. *Bracton,* Id., ii, 16, 3.

61. *Bracton,* Id., i, 8, 5. These sentences of Bracton are quoted with approval in the opinion of Justice Gray in *United States* v. *Lee,* cited supra.

62. *Bracton,* Id., iii, 9, 3.

63. *Bracton,* Id., iv, 10.

the king should be compared to the least of his kingdom.[64] It is well to remember that these words belong not to the days of Algernon Sidney, but to a Latin law-book written upon English law by a priest as early as the year 1260. Similar language can be quoted from the Assizes of Jerusalem, the Sachsenspiegel and the Établissements de St. Louis. The whole aspiration of the age is summed up by a rhymed Latin proverb of Wippo, who wrote the life of Conrad the Salic:

> Decet regem discere legem;
> Audiat rex, quod praecipit lex;
> Legem servare, hoc est regnare.
>
> The King's duty is to learn the law,
> Let him hear what the law commands;
> To keep the law, this is to reign.

Feudalism knew no such doctrine as that the king was not bound by the laws, and this is the language of an age when the king was the government.

IV

We pass to the next century, the thirteen hundreds, and we reach the new school of Roman lawyers, the Commentators, the greatest of whom was Bartolus. His pupil was Baldus, the first authority quoted by Justice Holmes. I have already stated what Baldus meant by "nemo suo statuto ligatur," but when we have a great jurist like Bartolus why "descend to batten on this moor," Baldus? Especially is this necessary because Bartolus makes the original statement that no one can give law to himself. To understand that phrase we must recognize that the commentators, Italian lawyers without much learning, were trying to reconcile the Roman law of the Corpus Juris with the conditions which they saw around them. They theorized the situation that the Roman law was the law of the empire and they figured the Italian commonwealths as parts of the empire. Italy was subject to the general sway of the German Emperor, in theory the successor of Charlemagne, Justinian, and Augustus. Each Italian state they conceived as having its own body of customary laws and legislation while over it all

64. *Bracton*, Id., iii, 9, 3. The original law is well shown in one of the first cases that we know after the conquest. Gundulph, Bishop of Rochester, sued Pichot, the King's sheriff, for certain land held by the King and finally recovered the land. *Bigelow's* "Placita Anglo-Normannica," p. 34. See this case explained Mich. Law Rev., XV, 4. The real difficulty arose from the formal difficulty. The writ of assize would run in the name of the King against himself.

they placed the imperial law of the Code, the Institutes, and the Digest. Theoretically, therefore, they tried to prefigure a federated state, but the Holy Roman Emperor was far away and the Italian states were fighting among themselves. Upon this situation Bartolus wrote his "Tractatus Repraesaliarum." He says: "All the doctors of the law incline to the opinion that against the man or people who neglect to do justice and to render what is due, resort can be had to a superior who may permit reprisals to the two litigants. First is required the authority of a superior, *for it is not lawful for anyone by his own authority to give law unto himself.* Second, it is required that the authority of the superior should interpose itself upon just cause."[65] This seems perfectly plain. Neither litigant can give law unto himself. The exact point is involved in saying that no one state on its own motion can change international law.[66]

This phrase of Bartolus was stolen by Bodin and a rather foolish and wholly unwarranted application made of it. But it is almost miraculous that Justice Holmes has decided the very case put by Bartolus. In the great contest over the pollution of the Illinois River between the states of Missouri and Illinois he wrote a most excellent opinion. His discussion of the scientific evidence cannot be too much admired for its clarity and conciseness. And he said in that case: "It [the Court] must follow and apply those rules [of general law], even if legislation of one or both of the states seems to stand in the way."[67] Why? Because neither Missouri nor Illinois could give law unto itself in its contest with the other. Here was the true application of the principle "no one can give law unto himself" and why in *Missouri* v. *Illinois* did he not quote Bartolus as well as Baldus? They were both with him when he was right.

Bartolus also commented upon the "Digna Vox," that constantly recurring sentence from the Roman Code (1, 14, 4). He discourses as follows: "Briefly it is said here that it is just and right that the prince or whoever has rule should live by the laws. It is said on the contrary that the prince is freed from the laws. Yet even so, it is worthy and just that he live by the laws. So this says. Wherefore he submits himself to the laws voluntarily and not upon compulsion. Thus you should understand this lex. But I ask what if the Emperor makes an agreement with another state?

65. Quaestio, 1, 2, 4.
66. *The Nereide*, 9 Cranch 388; *The Scotia*, 14 Wall. 170.
67. *Missouri* v. *Illinois*, 200 U. S. 496, 520.

Is he bound to keep the agreement? It would seem not if he is freed from the laws. But the contrary is true, for agreements belong to the jus gentium [in the Roman sense of natural law] and that law is unchangeable."[68] Ignorant as they were of the true historical setting of the texts, information not given until the mighty Cujas supplied all the material that Savigny borrowed and called his own, yet these men reached sound conclusions because a great stream of cultural tradition will always be found to be in accordance with the essential life of humanity in the social state.

I may quote a further passage which puts Bartolus' opinion beyond doubt: "The prince is not able to do anything that contains anything dishonest or unjust, for it is against the substance of the law. The law is a sanction from on high, jubens honesta et prohibens contraria. For the same reason if he wishes to take away my control over my property unjustly, he cannot, because the prince has his jurisdiction from God and God did not grant him jurisdiction to do wrong or to deprive another unlawfully."[69] And he adds: "What of the state? *I say the same with much greater reason because even by making law it cannot take away my ownership of my property without cause.*" This seems to be good constitutional doctrine and a very sound corrective for Justice Holmes' Juggernaut of "strong and preponderant opinion." At any rate, we may say that the commentators, the Bartolists, knew no such doctrine as that the government was not bound by its own laws. The great current of Roman cultural tradition still survives because it lives in the nature of justice without which society cannot live.

I advance into the next century, the fourteen hundreds, to Fortescue, a great name in English law, great as a practitioner, a chief justice and as a legal author. He says in "De Laudibus," written to instruct the young prince of Lancaster: "I wish you to know that not only the Deuteronomic Law (ten commandments) but also all human laws are sacred, because the law is defined in these words: lex est sanctio sancta, jubens honesta, prohibens contraria."[70] And again, "You have heard above that in the Roman law quod principi placuit habet legis vigorem. But the laws of England do not sanction this rule, for while regularly and in a political sense the king rules over his people, he is *bound to the observance of the laws* as he swears at his coronation."[71]

68. "Comment. Codex," p. 87.
69. "Comment. Codex," 1, 22, 6 (p. 112).
70. "De Laudibus," cap. 3.
71. "De Laudibus," cap. 34.

We come now to Bodin, the authority cited by Justice Holmes to his proposition that no one can give law to himself, so as to bind himself and to give others rights. We must locate Bodin in order to understand his words. The long war between the papacy and the secular sovereigns of Europe had been waged. The crafty Philip the Fair and his lawyers broke the papal power in France. He took prisoner the proudest of the pontiffs, Boniface VIII, in the papal palace, and the old man died of the shock. The papacy was carried to Avignon and the great schism began. Then came the Renaissance and the Reformation, with the secular power for a time triumphant over the spiritual power. The papacy through the Order of the Jesuits was driving back the Protestants and ruining further success of the Reformation. The last of the Valois kings, Henry III, was reigning. A Protestant prince in a Catholic country was certain to succeed as the next male heir. Rome claimed the right to refuse to permit his accession, and Henry IV had not yet abjured Protestantism in order that he might reign in peace as King of France. The country was rent with civil strife over religion. The sole hope for the future was a powerful kingship. Bodin is writing in the last part of the fifteen hundreds his "Les Six Libres de la République" as an earnest partisan of the secular monarchy against the papal claims. He thinks that he must establish the absolute power of the king, and he does it by propounding a theory as to the sovereign being the irresponsible power in the state.[72] His real theory is to show that the pope has no secular power and that certain laws do not apply to the king since the king is freed from the laws (Princeps legibus solutus est). But Bodin, it should be remembered, was no lawyer; *he may have claimed to be a jurist.* He cites the will of Phillipe of Valois, King of France, to show that the king was not bound by the private law. He cites the same king's gifts to his wife although gifts between spouses were for the most part unlawful in France. He cites royal marriage contracts "avec les dérogations à quelconques loix coutumes et dispositions qui sont au contraire" (all laws to the contrary notwithstanding). Anyone can see why such laws should not govern the head of the state. It is in his book one, chapter eight, where he is discussing the rule that the king is not bound by the private law that he uses the phrase taken from Bartolus and wholly misapplied, that one can give law to another but he cannot give law to himself. This is given as a reason why the private law and the police

72. See *Pollock's* "History of the Science of Politics," p. 53 et seq.

laws do not bind the prince. But Bodin went further, he thought that the prince could sit in judgment in his courts and was not bound by the laws in adjudicating; but the authority is otherwise.[73] At this very time Henry IV's great minister the Duc de Sully proposed a federation of all civilized states under laws to maintain the peace of the world. Bodin admits that his principle does not go beyond certain private laws and the criminal laws, and he admits that the king is bound by divine law (the ten commandments) and natural law by which he means the rules of natural justice. Fortescue had answered upon all these matters for the English law, and in France the current of cultural tradition goes on unbroken in the "De Jure Magistratum," which asserts that they who make laws should obey them, and whoever determines law for another, *that law he must use toward himself,* that nothing conduces more to good government than that the king should obey the laws. Finally the book cites the "Digna Vox" that a prince should acknowledge the supremacy of the law. It points out what Mommsen with German conceit thought that he had discovered, that the laws the prince was freed from under the Roman law were private laws as to wills and certain special police laws, and that the maxim did not apply to the public law or the law pertaining to the state, much less to either divine or natural law to which all men are subject. It concludes: "Either kings are not men or they are bound by this kind of law." It refutes Bodin's rule that the king is exempt even from any of the rules of private law and it especially controverts the idea that the king can adjudicate without respecting the laws and the forms of justice or that he has over his subjects any power of life or death.[74]

But for the French law the question is put to rest by Charondas le Caron (1596) in his "Pandectes ou Digestes du droit français." In chapter three, "Des loix et ordonnances et quelles doivent estre et si le sovereign est exempt d' icelles," he meets the question fully. He lays it down that the law is a mutual convention between sovereign and people of obedience on the one hand, and of command on the other. Why, then, is not the sovereign subject to it? All the kings, emperors, and monarchs who have merited the name of good princes have always said that the prince ought to obey the laws because he rules by their authority.[75]

I submit in all candor whether Bodin is not an extraordinary

73. *Esmein,* op. cit., p. 208.
74. *Esmein,* op. cit., p. 209.
75. *Esmein,* op. cit., p. 210.

authority to be cited by one of our Supreme Court in defense of a principle of absolutism. But is it not apparent that he was cited in default of any countenance of the doctrine from authoritative writers on French law? What authority has Bodin as against the great expositors of the French theory of law?

I could now go on to cite the great Jesuit authorities, who were of far higher authority and far more able men than Bodin. Molina, Mariana, Suarez, and Cardinal Bellarmine can all be cited to the principle that the state is bound to its citizens by its laws. Strange as it may seem the Jesuits were the upholders of free government as against the divine right of kings. I pass by Sir John Eliot, cited by Justice Holmes, for while he was a very excellent and amiable man, who never recovered from a foolish act of tyranny (he was one of the members of parliament arrested and imprisoned contrary to law by Charles I), he is of no authority upon such a question. He had no legal training whatever. The Petition of Right, the great arguments upon ship-money and the beheading of Charles I, left little of the proposition that the king was not bound by the laws.

V

We come now to the final authority cited by Justice Holmes, the much muddled absolutist Hobbes writing in 1651. The "Leviathan," chap. 26, 2, in its archaic spelling and punctuation is as follows: "The Soveraigne of a Commonwealth, be it an Assembly or one Man, is not subject to the Civil Lawes. For having power to make and repeale Laws, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free that can be free when he will: Nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound."

Now, this is a curious hodge-podge of mixed law and metaphysics. The government is not bound or subject to the laws because it can repeal them, and it may when it pleases free itself from subjection to the laws by repealing them. So far it is plain that what Hobbes means is that the government by passing a law or allowing one to exist does not bind itself not to repeal it in the future. But he admits that as long as the law exists *there is a subjection to the laws which can be ended by repealing the law.* He thinks of the citizen, who is in true subjection to the laws, because he cannot change them, while the government is not in such

subjection because it can repeal. This is no doubt true, but the question is, while the law is in existence is the government bound by it? Hobbes admits that it is. Next, Hobbes ventures on metaphysics and asserts that the government being able to repeal a law was free from this law before it was repealed, that is to say, the law while it stood unrepealed did not exist. This sounds like the assertion of some German of the Hegelian school. Hobbes did not mean to assert it, for he goes on to say that, as to not repealing, the government could be bound only to itself and hence it is not bound. This merely arrives at the very obvious principle that a legislature by passing a law binds neither itself nor its successor not to change it. But in what an awkward and splay-footed, truly Germanic, way it is that Hobbes arrives at the principle. Why could he not say at once that if the legislature could not change the law, legislation could not exist?

But few people, I suppose, would have the patience to read the "Leviathan" through. Most of it is now unintelligible nonsense. Its metaphysics in the first book are baseless. The third book on a Christian Commonwealth and the fourth book on the Kingdome of Darkenesse would disgrace the Dark Ages. If any one doubts this he may read it. I feel reasonably sure that Justice Holmes never had the patience to read the whole book, nor the Latin of the book "De Cive," which amounts to a common nuisance, for the books are against him on the proposition that the laws give no rights as against the government, which makes the law. I shall cite only "Leviathan," chapter 21: "If a subject have a controversie with his Soveraign, of debt, or of right of possession of lands or goods, or concerning any service required at his hands, or concerning any penalty, corporall, or pecuniary, *grounded on a precedent law; he hath the same liberty to sue for his right as if it were against a Subject* and before such Judges as are appointed by the Soveraign." Now would any reasonable man contend that Hobbes was not fully persuaded that any one aggrieved by the acts of the government could go into the courts and sue the sovereign willy nilly, as if he or it were a mere private party? The fact is that Hobbes was a pseudo-jurist, pseudo-philosopher and pseudo-mathematician. In his younger days he was a sort of devil,[76] or rather philosophical jackal for Lord Chancellor Bacon and loitered around Gray's Inn,

76. The younger lawyer who attached himself to the barrister in large practice was said to be his devil. Thus Kenyon deviled for Erskine. Hargrave for Thurlow, and I suppose the various young gentlemen who supplied Justice Gray with the endless references which make his decisions such tremendous bores, would be called his devils.

where he picked up a smattering of law and learned just enough law to make him presumptuous. It is little to the point that Hobbes was so densely ignorant that he did not know that the sovereign could not be sued, but that the proper process was by petition, for after all that is merely the form of the remedy. It is sufficient for our purposes that Hobbes does not support the citation in the case between the polysyllabic Hawaiians,[77] but is to the exact contrary. Hobbes, the pseudo-mathematician, had a controversy with a genuine mathematician lasting over years wherein Hobbes was repeatedly and most ludicrously worsted in his attempt to demonstrate the squaring of the circle and sphering of the cube. No lawyer of the time ever thought it worth while to expose Hobbes, but one would be just as much justified in claiming him to be a great mathematician as in citing him for a great jurist.

For complete treatment, I should now go on adducing such authorities as Leibnitz, Vico, Locke, and Montesquieu, but at the cost of no little labor I have demonstrated that Justice Holmes' rule that the government is not bound by the laws cannot be supported except upon some "subtle intuition" of his own, which is not so "articulate" as ever to have become the major premise of any other jurist. The lawyers, the jurists, the saints, the jurisconsults, the commentators, the glossators, the canonists, and even Hobbes, who was neither lawyer, saint, nor jurist, are against him; and this is sufficient for my purpose. I could go on and discuss the point from the standpoint of the historical development since Hobbes and show how the doctrine of the divine right of kings passed into the dogma of sovereignty,[78] and how this theory of some necessary uncontrollable power in the state, which used to be Parliament, but is now the House of Commons[79] is at last thoroughly exploded; for England's War Council which rules the Empire is an executive with representatives from the "Dominions beyond the Seas," and there is nothing left of the omnipotence of the House of Commons or of its executive cabinet. I could show the great harm that has been done by this theory of sovereignty among the French and how by M. Duguit the attempt to reconcile this theory either with a sound theory of government by law or with international law has been

77. *Kawananokoa* v. *Polyblank*, supra, which may be called here the corpus delicti.

78. See two books by *Figgis*, "From Gerson to Grotius" and "The Divine Right of Kings."

79. *Pollock's* "History of Politics," p. 117.

given up in despair.[80] The obvious answer given by a true science of politics is that there is and should be no uncontrollable power in government as our own history and England's history show, and there should be no uncontrollable power in society or the social aggregate itself,[81] for as soon as government passes certain bounds there is sure to result a revolution and as soon as society passes certain bounds in oppressing the individual, society disintegrates.

I could also discuss the point from the standpoint of the German metaphysical jurisprudence and its conception of subjective right as belonging only to a personality of will and show how Gierke, Jellinek, and Zitelmann apply this idea of a willing personality to the state and what they call its collective will, which is an individual will, a notion that is wholly Germanic and a mere cloak for absolutism. These jurists are in endless difficulties as between contract and tort obligations, and their inherent differences, but they all admit that legal relations arise between the individual will of the citizen and the individual will of the state, and they admit a legal right as between citizen and state. Even to these metaphysical dreamers the courts as representative of the state, which has assumed the duty of adjudicating men's rights, must respect the laws which give the individual his rights against the state and these rights they assume, may be overridden at any moment. But if there is anything more dreary than the juristic thought of metaphysicians who know nothing of law as an applied science, it is the metaphysical thought of jurists who do not comprehend their metaphysics. Justice Holmes for one has pronounced the derivative Hegelianism in law to be little better than nonsense and to the sentiment I offer my enthusiastic homage. It is regrettable that some younger French jurists have allowed themselves to be led into the "Serbonian bog" of subjective right which is not conceivable except as an objective abstraction from settled rules of law and thus can only lead to a vicious reasoning in a circle. For France the controlling declaration is still that of her first constitution of 1791: "There is in France no authority above that of the law. The king reigns [the government rules] only by the law and it is only in the name of the law that he

80. *Duguit*, "The Law and the State," Har. Law Rev., XXXI, 7. It is very strange that M. Duguit should apparently have changed his mind. In his book, "L'État etc.," some chapters of which are translated in Modern French Legal Philosophy, he argues at length to show that the state is bound by the laws. He refutes the German legal philosophy, but he is confused as to what justice is and does not see that equality is a necessary part of justice. He does not discriminate between the state and the government.

81. *Lieber*, "Political Ethics," I, 181: "Absolute power either in the society collectively or any individual is inadmissible."

[it] can exact obedience." In our country our national constitution, passed with its body of amendments, and our state constitutions render it impossible that any such theory as that of Justice Holmes can ever prevail among us. Since the world's future is to be given over to great federations we may be sure that the vicious Austinian and German theory of uncontrollable power in the state is doomed.

Here I leave the discussion with the final word that it is not to be supposed that Justice Holmes has any sympathy with any other form of government than our own, of powers strictly limited by law, but the statement that I have shown to be baseless, is an example of what sort of ideas may be encouraged by the Austinian school of legal philosophy even in one who is entitled to be numbered among the children of light. No one can read history as embodied in literature, so far as it has appealed to the future, without becoming settled in the conviction that the ancient world, and feudalism, and the age of absolutism all show the splendid effort of mankind to rise above its limitations and, while preserving society, to allow an opportunity to the individual. In the end everything depends upon the individual and the development of his social mind and the growing adjustment to social conditions continually growing more complicated. From out the ancient East and its laws comes the thought "Singly each man cometh into the world, singly he departeth, singly he receiveth the reward of his good deeds, singly the punishment of his evil deeds."[82] The awful spectacle of Germany, of a population trained to sink individual moral responsibility at the command of the state, ought to warn us anew of the curse laid upon those who destroy the landmarks that tell the progress of the ages.[83] For us to abate any part of our reverence for the rich inheritance of a "government of laws and not of men" would be to enact again the rôle

> "of one whose hand
> Like the base Indian, threw a pearl away
> Richer than all his tribe."[84]

---

82. "Institutes of Manu," Sir William Jones' Works, III, 19.

83. In those days in Germany before 1848, when its men of light and learning looked forward with hope, Dahlmann, one of that honorable band of professors at Göttingen, who lost their places when they protested against the violent abolition of the Hanoverian constitution, wrote a book on Politics. His first volume is in itself a very great work. It ought to be read to see how far Germany has traveled from a correct theory of the state, and how pitiful in comparison is the work of Jhering, a later professor at Göttingen.

84. In 1850 in the House of Representatives a preposterous person from Pennsylvania, named McLanahan, attempted the above quotation from

A country ruled by law, the aspiration of Aristotle and Cicero, the hope of the great Roman jurists, the ideal of the saints, the goal of all the ages is with us a reality, and we confidently look forward to a future where the same rule of law will compel all nations to dwell in peace and concord.

Othello and perpetrated this bull: "The base Judaean who, for thirty pieces of silver, threw away a pearl richer than all his tribe." He was embalmed for future ages by the caustic Toombs of Georgia.

B—CONSTITUTIONAL LAW

(A)—ENGLISH

THE BEGINNINGS OF ENGLISH CONSTITUTIONAL LAW

By H. J. Randall[1]

I

Introductory

Walter Bagehot commenced his famous essay on the English Constitution (written in 1867) with these words:

"'On all great subjects,' says Mr. Mill, 'much remains to be said,' and of none is this more true than of the English Constitution. The literature which has accumulated upon it is huge. But an observer who looks at the living reality will wonder at the contrast to the paper description. He will see in the life much which is not in the books; and he will not find in the rough practice many refinements of the literary theory."

If the accumulation of literature on the subject was huge in 1867, some stronger adjective must be used to describe it in 1918. The publication of Bagehot's book, in fact, marked the beginning of a new epoch in that literature. The classical theory, elaborated by Locke as a vindication of the Revolution Settlement, had crystalized into a dogma during the eighteenth century and lingered on after the Reform Act of 1832 as a literary tradition. The shattering force of Bagehot's essay brought the whole structure to the ground in an instant. A less forceful blow would really have sufficed for the purpose, because the theory was in a state of advanced senile decay. It no longer corresponded with the facts, whatever it may have done at one time; and it was out of harmony with the historical spirit of the age, and the all-pervading doctrine of evolution.

1. [Born Dec. 13, 1877, at Bridgend, Glamorgan, England; practicing solicitor at Bridgend. Mr. Randall has made a number of solid contributions to jurisprudence and political science, which have appeared chiefly in the Law Quarterly Review and the Journal of Comparative Legislation. The breadth of his intellectual interests is shown by his chapter "Law and Geography" in Evolution of Law Series, Vol. III, Boston, 1918.—Ed.]

This is proved by the fact that none of the works written before Bagehot's time, with the single exception of Hallam's History, possess any practical importance for present-day students. Bagehot and those that came after him, Stubbs, Freeman, Dicey, Anson, Courtney, Low, Maitland, Adams, and so forth, are the authorities upon which we now rely. Yet, notwithstanding the immense volume and range of the literature, historical, expository, and critical, no serious attempt appears to have been made to trace the development of the constitutional theories as distinct from the history of the constitution itself. The subject seems to present features of considerable interest. English political theory reflects the practical character of the national mind, and for that reason tends to found itself, even in the case of the more speculative thinkers, upon observation of the actual working of our institutions. The theory follows the development of the constitution itself, but it follows it at a distance.[2]

The real growth of an instrument so flexible in character is oftentimes concealed even from those most intimately concerned in its actual operation. The system of cabinet government had grown to maturity long before Bagehot wrote, but publicists went on repeating the old literary theory until he brought them back to the bedrock of fact. On the other hand, the theories themselves have influenced practice considerably, not only in the United Kingdom, but also beyond the seas. To take one striking instance: it may be affirmed confidently that several characteristic features of the United States constitution are directly attributable to eighteenth century views of the English constitution that are now known to have been erroneous. The history of theories that have influenced the course of human history at critical periods is well worthy of examination.[3]

On the present occasion it is proposed—however inadequately—to begin the history of our constitutional theory with a brief account of the earliest writers on the subject; from Fortescue, who began the long line, to Hooker, who predeceased the Great Queen by three years. The period corresponds, therefore, almost exactly to that of the Tudor dynasty.

2. Except perhaps during the Puritan Revolution when the output of fresh political theory was immense.

3. It is worthy of note that Paley writing in 1785 clearly apprehended and explained the difference between the theory and the actual working of the constitution: "Moral Philosophy," Book vi, ch. 7, quoted in *Dicey* "Law of the Constitution," 8th edit., p. 9 (n).

II

THE FIFTEENTH CENTURY[4]

To understand our first constitutional theorist it is expedient to appreciate the environment in which he wrote. The period of the Wars of the Roses is almost the least interesting in English history. This is partly caused by lack of knowledge, for the historical sources of the age are scanty, and in many instances unsatisfactory; but there is a more profound reason. Stubbs struck the right note in pointing out that the dominant characteristic of the period was its essential futility. It was a century of continuous war, but war of a sordid character, ennobled by no great object of policy. The adventures of Glyndwr in Wales devastated that country, and left marks that the passage of a century was hardly able to efface. The reopening of the French war under Henry V was totally without moral justification, whatever its economic causes may have been; and if contemporaries were blinded by the glories of Agincourt, those glories had to be paid for by long years of exhausting and unsuccessful warfare. Hardly had the soil of France (except for the outpost of Calais) been cleared of the English invader when the Wars of the Roses broke out, to continue, as they had begun, in a long series of personal and family quarrels, and with no results but the further exhaustion of the realm, and the practical extinction of the old feudal nobility.

The whole cause of this futility may be summed up in the words of the declaration made by Henry IV at his accession: "the which realm was in point to be undone for default of governance and undoing of the good laws." The failure to remedy that default was the measure of the failure both of the Lancastrians and the Yorkists. Success in doing so was the measure of the success of the Tudors.

From the point of view of constitutional history, the Lancastrian period is of great importance, but its importance was prospective, not immediate. The constitutionalism of the kings supplied a valuable series of precedents to later ages; but the experiment failed, because it was premature and unsuited to the needs of the times. The path of successful political development is always the same—"Order first, reform afterwards." The crying needs of the fifteenth century were the suppression of anarchy and private war, the enforcement of justice, and the reform of taxation. Until these

4. This section and those dealing with Fortescue are taken with small alterations from a paper by the present writer on "Sir John Fortescue" (Journal of Comparative Legislation, July 1916, Vol. XVI, p. 248). He has to thank the editors for permission to reproduce them.

had been satisfied the very foundation of a stable constitutional government did not exist. The Lancastrians were too weak in title, and above all too poor in pocket, to enforce the maintenance of administrative order, and so we have the story of this "bloody, futile, and immoral" age. That story may be read in a calm and judicious form in the pages of Stubbs, in more trenchant and vigorous language in Mr. Plummer's introduction to Fortescue's "Governance of England"; but it is portrayed more clearly because more unconsciously in the wonderful picture of contemporary society afforded by the Paston Letters.

III

FORTESCUE[5]

The details of Sir John Fortescue's life hardly concern our present purpose. It will suffice to say that he sat as Chief Justice of the King's Bench from 1442 to 1460, followed the fortunes and misfortunes of the Lancastrians (including a long exile in France) until their cause was utterly crushed at Tewkesbury in 1471, was taken prisoner at that battle, and lived in retirement until his death, which took place at some date subsequent to 1476. It will not be necessary either to give any account of his best known work, the "De Laudibus Legum Angliae," or of his minor treatises. We can confine our attention in the main to the "Governance of England," the work edited by Mr. Plummer and historically the most important of all. It is commonly called the "Monarchia," but there is no doubt of the superiority of the alternative title that Mr. Plummer has taken from the Yelverton MS. The descriptive title that the scribe prefixed to the Cambridge MS. is worth quoting:

> "A Treatise intituled Jus Regale and Jus Politicum et Regale, comprehending for good example memorable Councells of Estate Affaires; namelie as touchinge the King's charges ordinary and extraordinary, Enlarginge of the Reveneues of the Crowne, disposeinge of Offices and Rewardes for service, ellecting of Councelloures, and the disposeinge and orderinge of all other affaires of the Kinge, Kingdome, and Court."

The transparent honesty of the writer, his strong patriotic feeling, and the singular form that it sometimes assumes, his longing for good governance, and the vigorous, direct, and nervous style, combine to make the work one of extraordinary interest. Many of

5. The authority upon Fortescue is Mr. Charles Plummer's admirable edition of the "Governance of England" (Clarendon Press, Oxford, 1885). The following pages are founded almost exclusively upon the authority of this work.

his expressions are extremely happy. "Exquysite means of geytinge of good" (p. 119) is one, and "so his hyghness shall have thereoff, but as hadd the man that sherid is hogge, muche crye and litil woll" (p. 132) is another.[6] The famous comparison between English, French, and Scotch courage is unfortunately too long for quotation in this place.

There are two theories about the date of composition of the "Governance." One would suggest that it was written in the Lancastrian restoration of 1470, and recast by the author for Edward IV; the other that it was originally written for Edward IV, and mutilated in some copies by later Tudor scribes. Mr. Plummer inclines to think that the latter theory is the more tenable.

The chief works of Fortescue are commonly referred to as "treatises," and to a reader unacquainted with them the word is apt to create a wrong impression. They are totally unlike the long and comprehensive works of Bracton or Coke. In truth they are tracts or pamphlets of quite moderate compass, and not in the least encyclopedic and laborious compositions covering a wide field.

In the same way Fortescue differs essentially from most of the jurists of the Middle Ages. There is no very great parade of learning in his books, and the matter that distinguishes them above all other things is their practicality. We may concede that he possessed a fair amount of book learning, but knowledge of men and things and practical affairs is the feature that appears most strongly. He was a traveler on the continent by compulsion, not from choice, and he used his travels to observe attentively the actual institutions and social conditions that obtained—especially in France.

In this connection it is well to remember that Fortescue lived in the fifteenth century. The long controversy on the relations between the papacy and the empire—the background of all medieval political theory—was drawing to a close in the conciliar movement. Bartolus of Sassoferrato and Marsiglio of Padua, the last of the really great medieval jurists, had flourished in the preceding century. Bartolus resembled Fortescue in his practical aspect of mind, but he possessed a wealth of learning to which Fortescue could not pretend. He had worked out a theory of the relation between the papacy and the empire that made a place for the existence of the independent national state.[7] On the other hand the Renascence had hardly yet

6. The quotations are from Mr. Plummer's text, except that the old form has been modernized to *th*.

7. See generally the excellent study by Mr. *C. N. S. Woolf*, "Bartolus of Sassoferrato," Cambridge, 1913.

begun. More than fifty years intervenes between the composition of the "Governance of England" and the publication of Machiavelli's "Prince," and over a century before Bodin in his "Commonwealth" definitely promulgated the theory of sovereignty and ushered in the modern period in political thought. There does not seem to be any evidence in the works of Fortescue that he had really studied and appreciated the essential factors in the political theory of the Middle Ages. The relations between pope and emperor, the validity and effect of the Donation of Constantine, the reconciliation of the theories of Aristotle and those of the Roman jurists, the significance of the formula "Rex in regno suo est imperator regni sui"—all these matters Fortescue never mentions. The theoretical difficulties of the civilians he left aside if he ever knew of them; but he believed sincerely from practical observation in the superiority of the English polity and the superiority of the English people, and he was greatly troubled lest that superiority should be jeopardized "for default of governance and undoing of the good laws."

The incomprehensive and occasional character of the works of Fortescue is clearly demonstrated by their omissions. Except for one or two incidental references the first of our constitutional writers does not mention either Parliament or Magna Carta. The absence of any reference to Parliament is quite the reverse of what one would expect from a writer who had lived through the whole of the Lancastrian period. We do not think that the explanation lies in any wish to ignore the national assembly, but rather in the object that Fortescue had in mind. Parliament was then in working order and he simply assumes its existence. If he had intended to compose a systematic constitutional treatise, he would have described fully the working of the central assembly, but that was not his purpose. The "Governance of England" is a pamphlet, and a pamphlet with a definite practical object in view. It is not a constitutional treatise but a scheme of constitutional reform. In fact, to compare with a later age, Fortescue was not the Blackstone, but the Bentham of the fifteenth century.

The omission of any reference to Magna Carta, or the charters generally, is simply characteristic of the time. Dr. McKechnie has pointed out that during the fifteenth and sixteenth centuries Magna Carta suffered from comparative neglect.[8] For practical purposes many of its provisions had become antiquated, and others had reference to a condition of society that had passed away. The revival

8. *McKechnie's* "Magna Carta," 2nd edit., 1914, Intro.

of interest in the Charter took place in the seventeenth century when the writings of Coke (particularly the "Second Institute") placed it upon a pinnacle of sanctity from which it has never been displaced. Coke and his followers used it as one of the chief dialectical weapons in the constitutional conflicts of that period, but they did so by treating it in a manner that was radically unhistorical, and by reading into its provisions the law and social conditions of a later age. Fortescue lived before this revival or perversion and he therefore simply ignores it.

The theory of the difference between "dominium regale" and "dominium politicum et regale" is undoubtedly the most original contribution of Fortescue to political thought. Of its importance he was fully conscious. He emphasizes the matter in every one of his chief works, and particularly places it in the forefront of the "Governance of England." He begins that work by saying:—

"Ther bith ii kyndes off kyngdomes, of the wich that on is a Lordship callid in laten dominium regale and that other is callid dominium politicum et regale. And thai diversen in that the first kynge mey rule his peple bi suche lawes as he makyth hymself. And therefore he may sett uppon thaim tayles and other inposicions, such as he wot hym self, withowt thair assent. The seconde kynge may not rule his peple bi other lawes than such as thai assenten unto. And therefore he may sett upon thaim non imposicions withowt thair owne assent."

It is true that Fortescue makes no claim to originality for his views, but on the contrary supports them by a parade of scriptural and medieval learning. That, however, is merely a characteristic of the times. The whole of medieval thought is based upon the appeal to previous written authority. For a writer in those ages to have put forward a theory as an original contribution to thought, upon the basis of its intrinsic merits, and without any reference to the scriptures, the Fathers, Aristotle, or the civilians, would simply have been treated as an act of unparalleled presumption, and would have prevented him from receiving any serious consideration even if he had escaped a charge of heresy. Fortescue accordingly appeals to the Scriptures, to "Saynt Thomas", Roger of Waltham, Aegidius Romanus, Diodorus Siculus, and so forth; but Mr. Plummer has demonstrated that in none of these authors can there be found any real appreciation of the distinction between absolute and limited or constitutional monarchy.[9] The credit of the theory belongs to

9. It might have been admitted by these writers that an *elective* king could have limited powers—but only because he was not quite a real king. It is interesting to compare the way in which Bodin in 1576 deals with the English monarchy; vide infra.

Fortescue alone, and he founded it, not upon previous authority, but upon his own observation and reasoning. Incidentally this is shown by the fact that after discussing his authorities for two chapters, he devotes a third to a comparison between the results of dominium regale in France and those of dominium politicum et regale in England. The scholar and his authorities are thrown aside, and the practical statesman at once appears with the conclusion, "sumwhat now I have shewid the frutes of both laws, ut ex fructibus eorum cognoscetis eos." The whole point of view of this chapter with its definite basing of political theory upon the results of actual observation is strikingly original, and is a distinct foretaste of the not far distant Renascence.

The argument cannot have been altogether acceptable to a king with absolutist tendencies, and there is a very curious attempt to conceal the powder in the jam in the argument that both kinds of king are equal in estate and power. As the "politic" king cannot legislate or impose taxation without the assent of his subjects this courtly argument presents some difficulties. He maintains: "that both kings are equally like God, for though the law of an absolute monarchy is more like the law by which God governs the world, yet the law of a politic monarchy is more like that by which he rules his saints in bliss"[10]; and proceeds to argue that a limitation upon the power of doing wrong is an increase rather than a limitation of power. Mr. Plummer demonstrates the antiquity of the position, and adds, (p 218):

> "As to the value of the argument in itself, it seems to rest on a confusion between the inability to do wrong, which comes from the state of the will, as in the case of God and the angels, and that which is the result of mere external limitations. To say that the latter are in any real sense an increase of power seems absurd."

Truly the way of those who would argue kings out of absolutism is hard.

Two further points may be noted in connection with this theory with reference to Fortescue's knowledge of Roman Law.[11] There were two distinct lines in medieval political thought, one based upon the Roman law and the other upon Aristotle. The reconciliation of the two was naturally a task of no small difficulty. It is noteworthy that all the authorities quoted by Fortescue were Aristotelians, he nowhere seems to refer to a civilian by name.

10. *Plummer*, p. 179.

11. The present writer discusses this point in the paper previously referred to: Journal Comp. Leg., July, 1916, at p. 256.

Again, he speaks of the governmental and legislative power as "dominium," not as "imperium." One of the hardest tasks of the civilians was to reconcile the Roman imperium, the characteristic of a World State, with the actual exercise of political power in a world of states. Bartolus, for instance, is perpetually struggling with this difficulty, which was finally solved by the formula "Rex in regno suo est Imperator regni sui." Fortescue never knew of the problem or used the word imperium. Moreover, it is hardly likely that a trained civilian would not only have ignored the imperium, but used the word for property to express the idea.[12]

Fortescue not only propounds the distinction between absolute and constitutional monarchy, but he also has a theory as to their different origins. In a word it is, that dominium regale was first founded on conquest and the might of the prince, dominium politicum et regale upon the consent of the people. In the "Natura Legis Naturae" he contends that monarchy is an institution of the law of nature: "as after the saynge of the philosopher every comunatte vyned of many parties must nedis have an hed"—and because man is naturally a social and political animal. This part of the theory is probably derived from Vincent of Beauvais.

Upon the practical side the two great questions that are always before the mind of Fortescue are those of finance and of administrative order. His views are of prime importance to the constitutional or economic historian. He begins with a vivid description of France—evidently the result of his own observation. If his assertions can be relied upon they would appear to demonstrate that some of the seeds of the French Revolution can be traced back earlier than the time of Richelieu.

The main matter that troubles Fortescue is the poverty of the Crown. In that he has undoubtedly hit upon one of the principal causes of the Lancastrian failure, and the results could not be summarized better than in the chapter on "The Harme that comyth of a Kynges Poverte." Poverty leads to borrowing, which increases the loss, the non-payment of wages makes subjects disaffected, and gifts and rewards have to be made by assignment instead of being paid in cash; but the greatest part of the harm is that the king is compelled to resort to "exquysite meanes of geytinge of good." No realm can prosper under a poor king.

There follows a detailed account of the king's ordinary and extraordinary charges, and finally after a survey of the position we

12. It can be noted, however, that Dominium was the official designation of the Republic of Venice: vide Du Cange.

come to the remedy—"How that the Crowne is beste to be indowed." Fortescue pronounces against taxation, after considering the effect of the salt gabelle and the tax on wines in France, and he really goes back to the medieval idea that the king should live of his own. He wants to see the king as the greatest landowner, the feudal dues strictly enforced, and the crown lands rendered inalienable—the whole to be effected by an Act of Resumption. Some most striking chapters on the wealth of the English people as compared with the poverty of the French peasantry conclude the discussion on finance.

In this connection there is one feature that must always strike readers who have the advantage of knowing the history of later times. It never seems to have occurred to Fortescue that the necessity for obtaining popular consent to taxation was the one sanction that maintained the dominium politicum et regale, and that if he could really have succeeded in so endowing the Crown as to make it independent of the necessity of asking for supply, redress of grievances would be likely to fade into the background, and the English monarchy in the hands of a strong and ambitious king would have become as purely absolute as the sovereignties with which he compares it. The full extent of that danger was not patent at the time. The Lancastrians had always ruled in a constitutional manner, and the evils of chronic disorder and the weakness of the Crown in the presence of "ouer myghtye subgettes" were so great as to overshadow every other consideration.

Finally Fortescue propounds his own remedy for the "lack of governance and the undoing of the good laws" in a reform of the Privy Council. The new council is to number thirty-two members. Of this number twenty-four, composed of twelve "spirituell men" and twelve "temporell men" are to be permanent members chosen of the wisest and best disposed that can be found in all parts of the land, bound by a stringent oath to take no fee or reward of any man save the king, and holding office at the king's pleasure. The remaining eight members are to be made up of four lords spiritual and four lords temporal, holding office for one year only. The chief of the council, or prime minister as we would say, is to be chosen by the king out of the twenty-four permanent members.

With his usual minute attention to practical details he goes on to discuss the provision of the wages of the councillors, and then describes their functions in words that we venture to transcribe in full (p. 147):

"Thies counsellors mowe contenually at soche owres as shall be asseigned to thaym, comune and delibre uppon the materes of defeculte

that ffalen to the kynge; and then uppon the materes off the pollycye off the reaume; as how the goyng owt off the mony may be restrayned, how bullyon may be brought in to the lande, how also plate, juelles, and mony late borne owt, may be geytun ageyn; off wich right wyse men mowe sone fynde the meanes. And also how the prises off marchaundise growen in this lande mey be holde up and encressed, and the prises off merchandyses browght in to this lande abatid. How owre navy mey be mayntened and augmented, and uppon suche other poyntes off police, to the grettest profyte and encresse, that ever come to this lande. How also the lawes mey be amendet in suche thynges as thay neden reformacion in; when through the parlementes shall mowe do more gode in a moneth to the mendynge off the Lawe, then thair shall mowe do in a yere, yff the amendynge thereoff be not debatyd, and be such counsell ryped to thair handes."

The whole of the proposals are discussed in great detail by Mr. Plummer in a series of notes to which the reader desirous of pursuing the subject in greater detail can be confidently referred. We will only mention one point here, viz., how far the proposals of Fortescue were original. Upon this there is a distinct conflict of opinion between Mr. Plummer and Stubbs. The latter says that Fortescue "sketches a system of reform, many parts of which are a mere restoration of the system that was in use under the Lancastrian kings."[13] And again, "except the exact determination of the selection and number of the councillors, Fortescue's scheme contains nothing which had not been in principle or in practice adopted under Henry IV and Henry V."[14]

We must agree with Mr. Plummer that in these passages the great Oxford historian has been less than just to the originality of the great Chief Justice. The essence of Fortescue's plan was not a reversion to Lancastrian practice, but an anticipation of that actually followed under the Tudors. His constant obsessions were the weakness and poverty of the Crown, and the dangers of "ouer myghtye subgettes." It was these "ouer myghtye subgettes" who for the most part composed the Lancastrian councils, and his proposal was to substitute for the council of magnates an official council chosen on the sole ground of capacity for business. The Tudor kings not only increased the power of the Crown as he desired, but effected that increase in the way that he had foreshadowed. He was equally happy in his anticipations of the business methods of the council and of the subjects of deliberation, and not least so in the suggestion that one of their most important functions should be

13. "Const. Hist.," Lib. ed., Vol. III, p. 261.
14. Op. cit., p. 263.

the preparation of measures for the consideration of Parliament.[15]

IV

More's Utopia

Perhaps it would be undesirable to pass over the Utopia without mention in considering any aspect of political thought in the sixteenth century, but for the student of constitutional history its importance is of the smallest. Its place in English literature stands upon an unassailable foundation; it takes a high place in the series of ideal commonwealths which the general sense of mankind has decided may be very delightful to read about, but would be exceedingly uncomfortable to live in; and as an ironical commentary upon contemporary social conditions it has few equals. Possibly the chancellor of Henry VIII considered that any direct reference to the actual working of our institutions would have been too dangerous, and an explanation founded on the fictitious character of the whole work might have been rejected for insincerity. However that may be, the chapter "Of the Magistrates" is the shortest of all and merely describes an elective monarch with some lower officials from whom his council is chosen. It is very slight altogether, and too imaginary to indicate any of More's ideas as to the actual government of this realm of England. For the rest, such matters as the death penalty for theft, the ownership of property in common, the evils of inclosures, and even the strained interpretation of statutes, are subjects of social rather than constitutional history.

V

Doctor and Student

In 1531[16] Christopher St. German published anonymously his "Doctor and Student"; or "Dialogues between a Doctor of Divinity and a Student in the Laws of England, containing the Grounds of those Laws, etc." In considering St. German's outlook the date is most important. He comes just at the end of the medieval thinkers, just before the transformation of political thought in the sixteenth

15. There is an important paper, "The Influence of the Writings of Sir John Fortescue," by Miss *C. A. J. Skeel,* in Trans. of Royal Hist. Socy. (London) for 1916.

16. This is the date usually given, but the Dictionary of National Biography gives 1523 for the publication of the first part and 1530 for the complete edition.

century. England was in the middle of the important, if unsavory, controversy over Henry's projected divorce. The old order was still standing, though the Reformation Parliament had just begun its memorable sittings. Theories of absolutism were in the air and were reaching this country,[17] but few were yet audacious enough to assert that every state possesses a sovereign authority, and that law is based on the possession by the state of irresistible force. St. German writes purely from the standpoint of a lawyer, he neither professes to expound a theory of politics nor to describe the working of the constitution, but his work is of greater interest for that very reason.

In the beginning of the "Dialogue" the Doctor of Divinity requests the Student to explain to him whereupon the law of England is grounded, "because the most part of the law of England is written in the French tongue, therefore I cannot, through mine own study, attain to the knowledge thereof, for in that tongue I am nothing expert." The Student gladly complies with the request, but first asks the Doctor to explain to him the grounds of law in general according to the theological view. The Doctor replies that there are four such laws (or sources of law), viz., the law eternal, the law of nature, the revealed law of God, and the law of man or positive law.[18] After these have been duly expounded the Student takes up the tale, and sets out six grounds of the law of England.[19]

"First, it is grounded on the law of reason. Secondly, on the law of God. Thirdly, on divers general customs of the realm. Fourthly, on divers principles that be called maxims. Fifthly, on divers particular customs. Sixthly, on divers statutes made in parliaments by the king, and by the common council of the realm."

Although the matter is of great interest, it would be outside our present subject to examine St. German's exposition of these grounds, and more especially of the law of reason.[20] But one point stands out with great clearness. Laws do not derive their authority from the king or Parliament. The statute law was indeed a ground of the law, but one of comparative insignificance and the last to be

17. Vide the notes to *Maitland's* "English Law and the Renaissance."

18. The detailed exposition of these classes should be compared with *Hooker's* account in Book 1 of the "Ecclesiastical Polity." They are the best English authorities for medieval ideas on law in general.

19. "Dial.," I, chap. v, ad fin.

20. The reader who is curious on the matter may be referred to *Bryce*, "The Law of Nature" in "Studies in History and Jurisprudence," Vol. II, p. 112; *Pollock*, "The History of the Law of Nature" (Journal of Comp. Leg., 1900, p. 418, and "The Expansion of the Common Law," Lect. IV.

mentioned. It is all far distant from the idea of law as the command of the sovereign, and the maxim that what the sovereign permits he commands. This is further exemplified by the fact that when St. German comes to treat of statute law he dismisses the entire subject in one sentence:[21]

> "The sixth ground of the law of England standeth in divers statutes made by our sovereign lord the king and his progenitors, and by the lords spiritual and temporal and the commons in divers parliaments, in such cases where the law of reason, the law of God, customs, maxims, nor other grounds of the law seemed not to be sufficient to punish evil men and to reward good men."

That disposes of the subject, and his notion clearly is that the law in general rested upon the five grounds previously mentioned, but that if it should so happen that the results were unjust or unreasonable in some particular matter, there existed a residuary power in the king in Parliament to set matters right.

So much for the body of the work, but the edition of 1531 contained certain additions to the Second Dialogue—"On the power and jurisdiction of the Parliament." The question is considered, as is natural in a dialogue between a theologian and a common lawyer, entirely with reference to the authority of Parliament in matters spiritual. These added chapters were omitted in all subsequent editions until the middle of the eighteenth century. The work of the Reformation Parliament, the definite breach with Rome, and the assumption by the king of the title of supreme head on earth of the Church of England, had rendered the angle of vision of this portion antiquated, and the publication of such views not a little dangerous.

We moderns have been so impregnated with the theory of the sovereign state, and especially with the doctrine of the sovereignty of Parliament, that the very form of the question, "What the Parliament may do concerning the spirituality and the spiritual jurisdiction, and what not?" is startling in itself. But St. German argues the whole matter out in that way in a perfectly natural manner. He has already relegated statute law to the bottom of his list of "grounds," and has apparently only admitted it at all as a supplementary source of law. It is true that in the course of the argument he betrays the inherent desire of the common lawyer to enlarge the list of the things that Parliament may do, so as to limit the ambit of the ecclesiastical jurisdiction, but he propounds the idea that an act of Parliament may be void without the least sense of singularity.

21. "Dial.," I, ch. xi.

The predisposition of the Student is shown in the opening words:

"There was a law made of mortuaries in the Parliament holden in the 21, Hen. VIII, c 6. by the assent of the king, and of all the lords spiritual and temporal of the realm, and of all the commons; and I hold it not best to reason, or to make arguments, whether they had authority to do what they did or not. For I suppose, that no man would think, that they would do anything that they had not power to do."

His general position is that legislation in temporal matters belongs as of right to Parliament, but that matters strictly spiritual are outside its jurisdiction. Render therefore unto Cæser the things that are Cæsar's and unto God the things that be God's. He quotes medieval jurists—especially Baldus and Gerson—in support of his arguments, and with the exception of Hooker he must have been one of the last English political theorists to do so.

The dialogues are chiefly occupied with attempts to apply the general principle to concrete cases that lie rather on the border line. The details of these do not concern us, but the general principle is one of great interest.

Thus speaking of mortuaries in chapter 1, he says:

"And all temporal things the king and his progenitors, as in the right of the Crown, have in this realm always ordered and judged by his laws."[22]

But whilst anxious to extend the scope of parliamentary legislation, he is careful to state that he is arguing only in favor of the existence of the power, and not as to the expediency of exercising it.

" But I pray thee take me not, that my meaning is, that I would that such statutes should be made as I shall speak of: for I do it not to that intent, but only to shew the power of the parliament what they may do if they list to execute their power" (p. 312).

And he repeats the same sentiment in other places.[23]

But despite his predisposition to extend the secular authority, the Student is perfectly clear that there are definite limits to that authority, and that statutes that attempt to overstep those limits are void. It is particularly significant in view of Henry's divorce proceedings that he has no sort of doubt that matrimony is within the exclusive province of the spiritualty.

"And yet a statute hath no authority to prohibit, nor to confirm no right of matrimony: but as the church prohibiteth it or confirmeth it. And therefore if it were prohibited that no lord's son should affie an

22. P. 309. The quotations and page references are from the sixteenth edition, published in 1761.
23. E. g., p. 317. Add. chap. v.

husbandman's daughter, or such other, and if he did, the affiance to be void, I think that statute were void."[24]

Perhaps it will be convenient to conclude this section with the following statement of the Student's general position:

"And all these diversities, and many other more than I can rehearse now, they that be learned in the laws of the realm be especially bounden to know, that they may instruct the parliament when need shall require, what they may lawfully do concerning the spiritual jurisdiction, and what not. And therefore spiritual men are bound charitably to hear their opinions therein, and what they think be immediately grounded upon the law of God, or upon the law of reason, and what not. For commonly the parliament hath over these laws no direct power, but to strengthen them, and to make them to be more surely kept it hath good power."[25]

VI

Sir Thomas Smith[26]

Smith's "De Republica Anglorum" was the first treatise to be published upon the constitution as such.[27] That fact, and the fact (to quote Maitland) that "his little treatise comprises some sentences touching the powers of Parliament which have been quoted and transcribed times without number, and which will be quoted and transcribed so long as men take any interest in the history of the English constitution,"[28] render the volume one of very great interest. The author was remarkable for the extraordinary variety of the offices that he held at various times. A priest of the church who nevertheless entered the House of Commons, a learned "civilian" and the first Regius professor of Civil Law at Cambridge, an accomplished scholar "seen"[29] not only in the tongues, but in mathematics and natural philosophy, an ambassador abroad and secretary of state at home (to name a fraction of his appointments) he stood high in the world of politics and in the republic of letters. "Rev. Prof. Dr. Sir Thomas Smith, Knt., M. P., Dean of Carlisle, Provost of Eton, Ambassador to the Court of France, and Secretary

24. P. 330. Add. chap. x.
25. P. 332. Add. ch. x.
26. There is an admirable edition of *Smith's* "De Republica Anglorum," edited by Mr. L. Alston, largely from materials collected by Maitland (Cambridge 1906). I have relied almost entirely upon this volume for the facts, and very largely for the comments also.
27. *Fortescue's* "Governance of England" was not published until 1714.
28. Preface to Alston's edition of "De Republica," p. vii.
29. The reference is to the original commentator's caustic comment upon Smith's criticism of Littleton. "Litleton seene in the tongues as Sir Thomas Smith was in Litleton": III, ch. 8.

of State to Queen Elizabeth" is the way Maitland describes him.[30]

The little treatise is dated with punctilious accuracy on 28th March, 1665, "in the VII yeare of the raigne and administration thereof by the most vertuous and noble Queene Elizabeth, daughter to King Henrie the eight, in the one and fifteeth yeere of mine age, when I was ambassador for her majestie in the court of Fraunce."[31] It was not published until 1583, six years after the author's death. It ran through many editions and was frequently reprinted throughout the seventeenth century. Its angle of vision is curiously unlike that of a modern treatise. There are some chapters upon general political theory, but the two subjects that engross Smith's attention are "The Sorts and Conditions of Men," and the system of judicature. He is very precise (in the chapters that were borrowed from Harrison's "Description of England") about the persons of the commonwealth, but the major portion of the volume—in fact the whole of the second and third books—is concerned with a minute and lively description of the constitution and procedure of the law courts. If he had any abstract theory on the subject—which he almost certainly had not—he would probably have agreed with those modern writers of the Benthamite school who regard the state as a justice-enforcing institution.[32] The great officers of state are hardly mentioned, much less described; the Privy Council, the most active engine of government under the Tudors, is disposed of in an incidental reference; but the sessions of gaol delivery are portrayed in entertaining detail, and even the Court Baron has a chapter to itself.

Of general political theory the work contains little of moment and nothing of much originality. Smith was a learned Grecian,[33] and a true child of the Renascence. Medieval political theories were passing out of remembrance, and the works of the medieval jurists were beginning their long slumber on the top shelves of libraries, but the characteristic theory of the Renascence had not yet been formulated with precision. Smith knows nothing of the arguments that supported the respective claims of pope and emperor, nothing of the law of nature, nothing of the divine right of kings. On the other hand he has no definite ideas on the subject of sovereignty. Most of his general notions are derived from Aristotle, though he has shrewd comments of his own to offer.

30. "English Law and the Renaissance," p. 10.

31. Alston's edition, p. 142.

32. E. g., *Sir Ronald Wilson*, "The Province of the State."

33. For the part taken by Smith in the controversy as to the "new" pronunciation of Greek, vide *Mullinger's* "History of the University of Cambridge," Vol. II, pp. 54 et seq.

The definition of a commonwealth[34] is worth quoting:

"A common wealth is called a society or common doing of a multitude of free men collected together and united by common accord and covenauntes among themselves, for the conservation of themselves as well in peace as in warre."

It would not be reasonable to infer from this that Smith professed the theory of the original contract. There is no trace of it in any other part of the book. In fact so far from basing the origin of civilized society on contract, our philosopher derives all the Aristotelian forms of government from the natural development of the family. Far from postulating any artificial origin of the state, he evidently regards the whole process as an orderly growth, a process of "provining and propagation" as he quaintly phrases it, only liable to be changed by the sharp interruption of forcible conquest. His is the patriarchal theory of the Elizabethan age.

It is curious to note the striking resemblances in method and outlook between Smith and Fortescue. Fortescue's "Governance of England" was not published until 1714, and it is perfectly evident that the later work was not modeled on the earlier. The actual contents of the two are quite different. Fortescue, despite his judicial experience, is not nearly so interested in the procedure of the courts as the civilian who had never practised at the English bar; but Smith is merely writing a descriptive treatise on account of his interest in the subject-matter, he is not adumbrating a scheme of political reform. Nevertheless the resemblances are great. Both men had traveled abroad, Fortescue as an exile, Smith as a diplomatist; both had made good use of their opportunities for observation of foreign institutions; both were convinced of the superiority of English ones. The patriotism of Smith is neither so aggressive nor so quaint as that of Fortescue, but there is a strong underlying conviction of the virtues of John Bull. Fortescue's standard of comparison was between constitutional England as the example of dominium politicum et regale and absolutist France as dominium regale; Smith, with his juridical rather than political outlook, makes his regular comparisons with "the policie or government at this time used in Fraunce, Italie, Spaine, Germanie, and all other countries, which doe followe the civill lawe of the Romanes compiled by Justinian into his pandects and code."

Both works are comparative and positive rather than theoretical and abstract in method. Neither is fortified or encumbered with the elaborate theories and lengthy arguments of the medieval

34. Book 1, ch. 10, p. 20.

publicists, the method of both is to look closely at living institutions and see how they work. The two earliest works on the English constitution can both be classed as essentially studies in comparative politics, written by men who had observed the comparative working of institutions with their own eyes.

This feature is particularly prominent in Smith. We are apt to regard the comparative study of institutions as a peculiar product of nineteenth century thought, and to forget that it was the method of Aristotle, Bodin, and Montesquieu. The famous aphorism of Mackintosh that constitutions are not made but grow, seems to mark a new era in the history of speculation. A reader with these ideas in his mind will be struck by the modernism of Smith. Society is to him a growth conditioned by its environment. He does not use such terms, but speaks in a homely way of a shoe fitting to the foot and a garment to the body. Again and again he uses the word "natural" as applied to the origin and growth of institutions, and he concludes the more general portion of his work with a chapter on the subject: "That the commonwealth or policie must be according to the nature of the people" (Book 1, ch. 15). In it he says:

> "By this processe and discourse it doth appeare that the mutations and changes of fashions of government in common wealthes be naturall, and do not alwayes come of ambition or malice: And that according to the nature of the people, so the commonwealth is to it fit and proper."

A modern thinker of the historical or evolutionary school would not seek to alter a word of this.

In the course of his multitudinous activities Smith never appears to have been called to the bar, or to have practised as a common lawyer. To his deep regard for those practitioners he testifies in his Cambridge lectures. The edition of 1583 and certain of the later editions contain a number of marginal notes which correct, and apparently quite rightly correct, Smith's statements on a considerable number of legal points. They are chiefly upon matters of technical detail, and in no way detract from the general accuracy of our author's descriptions. This leads to the consideration of a more interesting question. Readers of Maitland's "English Law and the Renaissance" will remember that Smith's earlier activities are the subject of considerable observation. He had qualified for the Regius Professorship by taking his doctor's degree in law at Padua, he had visited the French universities which were the center of the new birth of the Roman Law, later on he acted as a Master in the

Court of Requests. The trend of Maitland's argument leaves one under the impression—he does not say so directly—that Smith might have been a follower of Reginald Pole and the others who were directly advocating a reception of the Roman Law in England. He refers to Smith's two inaugural lectures at Cambridge which have been preserved, but never published.[35] In these lectures Smith enlarges on the importance of his subject as any professor would in an inaugural lecture. He examines the career that was open to a civilian in England, but does not (as Maitland candidly admits in a note) give "any hint that knowledge of Roman Law will help a man at the bar of the ordinary English courts." Neither, we may add, do they contain any hint that Roman Law might be advantageously "received" in England in place of the common law. Smith's lectures in fact show as great an enthusiasm for the subject as that of Maine, delivered three hundred years later from the same chair, and for much the same reasons.[36] The "Republica Anglorum" was written in 1565, by which time any possible danger of a reception in England was over, but there is no suggestion in the numerous comparisons between English institutions and those of countries "which doe followe the civill lawe of the Romanes" that Smith thought the civil law superior, or had ever thought so. Upon the whole the innuendo that our author was an advocate of an English reception must be dismissed as not proven. There is no real evidence in support of it, and there is strong evidence on the other side.

But it is time to pass to the famous chapters on Parliament, beginning with the words "The most high and absolute power of the realme of Englande, consisteth in the Parliament," and concluding with the oft-quoted passage as follows:[37]

"That which is donne by this consent is called firme, stable and sanctum, and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe, giveth orders for thinges past, and for thinges hereafter to be followed, changeth rightes, and possessions of private men, legittimateth bastards, establisheth formes of religion, altereth weights and measures, giveth formes of succession to the crowne, defineth of doubtfull rightes, whereof is no lawe already made, appointeth subsidies, tailes, taxes, and impositions, giveth most free pardons and absolutions, restoreth in bloud and name as the highest court, condemneth or absolveth them whom the Prince will put to that triall: And to be short, all that ever the people of Rome might do either in Centuriatis

35. Baker MSS. XXXVII in Cambridge University Library. There is an excellent summary of the lectures in *Mullinger's* "History of the University of Cambridge," Vol. II, pp. 129 et seq.

36. "Roman Law and Legal Education," in "Cambridge Essays for 1856," reprinted in "Village Communities."

37. Book 2, ch. 1: Alston's edition, p. 49.

comitiis or tributis, the same may be donne by the parliament of Englande, which representeth and hath the power of the whole realme both the head and the bodie. For everie Englishman is entended to bee there present, either in person or by procuration and attornies, of what preheminence, state, dignitie, or qualitie soever he bee, from the Prince (be he King or Queene) to the lowest person of Englande. And the consent of the Parliament is taken to be everie mans consent."

Upon the authority of this passage, Smith, the servant of successive monarchs of the House of Tudor, has been considered the first great advocate of the principle of parliamentary sovereignty. The fact would be striking indeed if it were so, but before we can admit such a conclusion it would be well to examine the passage somewhat closely in the light of surrounding conditions. It may be that modern historians, looking at the matter in the light of after events, have read into the passage a stronger significance than it will really bear.

In the first place it can be affirmed confidently that Smith, in the year 1565, never entertained the idea of a possible conflict between the king and Parliament. Why should he? There had been no such conflict since the Tudors began to reign; that house, however absolute in reality, had studiously observed the form of legislation by "the Prince in Parliament"; the Commons had never put forward any claim to control the administration, that was "the king's business"; and what historians now regard as premonitions of the conflict of the seventeenth century occurred towards the end of the reign of Elizabeth, not at the beginning.[38]

In the second place, as Mr. Alston has shown in some detail, there is no need to infer that when Smith speaks of "the most high and absolute power," as applied to Parliament he is thinking of what we call sovereignty. It is necessary to repeat that the book was written eleven years before Bodin's great work first appeared. He is always using the word "absolute", most often in the sense of not subject to appeal, but sometimes with other meanings, as when he describes a Queen regnant as "an absolute Queen." And he admits degrees of absoluteness, as in his description of judgment by parliament as "highest and most absolute." Assuredly an absoluteness that admits of degrees is not in the same category as Bodin's idea of sovereignty.

38. Hallam's short comments on Smith ("Const. Hist.," 3rd edit., Vol. I, p. 383) are irritatingly perverse. He can only regard him through Whig spectacles, and treats him as an advocate of royal authority who was afraid to speak out, and an evader of all great constitutional principles. In this respect he compares him unfavorably with Fortescue, who hardly ever mentioned Parliament at all!

There is indeed the chapter (1, 8) "Of the absolute King" which contains expressions that seem to imply that Smith was thinking of sovereignty in its modern sense. But the chapter as a whole will hardly bear such an interpretation. He has in mind a Greek tyrant or a Roman dictator, one who ruled "absolutely" in defiance of law and right, or one who was given an authority unlimited, but temporary, for the safety of the commonwealth. The chapter ends with the significant passage:

"A tyrant is counted he, who is an evill king, and who hath no regard to the wealth of his people, but seeketh onely to magnifie himselfe and his, and to satisfie his vicious and cruell appetite, without respect of God, of right or of the law; because that for the most part they who have had that absolute power have beene such."

In the third place, although he does not enlarge upon the subject,[39] it seems clear that Smith is writing under the influence of the idea that the law is supreme, and that the several parts of the commonwealth have proper functions allotted to them beyond the bounds of which they cannot rightly trespass. It is true that the law can be altered by the king in Parliament. It is even true that:[40]

"The Prince useth also to dispence with lawes made, whereas equitie requireth a moderation to be had, and with paynes for transgression of lawes, where the payne of the lawe is applyed onely to the prince. But where the forfaite (as in popular actions it chaunceth many times) is part to the prince, the other part to the declarator, detector or informer, there the prince doth dispense for his owne part onely."

The qualifications are most significant. The dispensing power in the case of laws only exists "whereas equitie requireth a moderation to be had," or in accordance with the principles of right; and in the case of penalties the prince can only renounce the penalty due to himself, he may not by his own act despoil another man of his right. The power of dispensing with law is itself limited by law.

But again we must not be too modern. In his division of the functions of the state, Smith is not thinking of anything so clear cut as Montesquieu's separation of the powers. He divides the ordinary functions of a commonwealth under five headings, (1) Legislation, (2) Making war and peace, (3) Taxation, (4) Election of chief officers, (5) Administration of justice. The first and third are done by the prince in Parliament, the second and fourth by the

39. E. g. book 1, ch. 8, "the royall power regulates by lawes; of this I will not dispute at this time".
40. Book 2, ch. 3, p. 61.

prince himself, and the last he describes in minute detail. There is no theory in this, good or bad. He is content to describe the things that are done, and the persons or bodies that do them, and to leave it at that.[41]

The question of the separation of the powers leads us to touch upon that phrase that sounds so strangely to modern ears—the high court of Parliament. However we may regard Parliament now, we hardly ever think of it as a court. Yet the name is current throughout the sixteenth and well into the seventeenth century. Smith habitually uses the term in a perfectly natural way. We may again repeat the statement that no precise theory of the separation of the powers had as yet been formulated. Of course, Smith is quite well aware of the fact that Parliament in enacting legislation was doing something that was not at any rate within the acknowledged powers of any other court. But the point is that the difference between the powers of Parliament and those of the lower courts is not sufficient to make it necessary to place Parliament in an entirely separate category. It is assuredly "the highest and most authentical court of England," but it nevertheless remains a court, not an institution sui generis.

The general idea underlying the expression "High Court of Parliament" appears to be this. The private individual with a grievance applies to the king's court for redress, and if his claim is well-founded will obtain it; and the decision by becoming a precedent will have an application far wider and more lasting than the particular case. It will, in fact, form part of the general law of the realm. But grievances may exist for which no appropriate legal remedy suffices, or which may affect the realm at large, or a considerable portion of it. To remedy these, recourse must be had to the grand inquest of the nation—the High Court of Parliament. But the redress of grievances by Parliament and their redress by other courts were matters differing in degree, not in kind. At the same time this explanation must not be pressed too far. The legislators of the sixteenth century quite realized what they were doing, but they would have recognized limits to the scope of legislation, such as the law of nature, that their successors have abandoned.

41. It is fair to state that the view here presented of Smith's ideas on sovereignty and the powers of Parliament are in some conflict with the very high authority of *Sir Frederick Pollock* ("History of the Science of Politics," revised edition, p. 57). He says: "Indeed so clear and precise are Smith's chapters on sovereignty that one is tempted to think he must somehow have had knowledge of Bodin's work. At the outset he defines political supremacy in a manner by no means unlike Bodin's."

Even now there is some truth in the expression. Some parts of private bill legislation, such as legitimation acts, acts for the resettlement of estates, divorce acts in England before 1857, and in Ireland at the present day, are little more than judicial decisions under the guise of legislation. The procedure in all cases of private bills approximates very closely to that of a court. If we may once more produce that elegant fiction, the intelligent foreign observer, we may imagine him asking his English cicerone: "If Parliament is a purely legislative assembly, as you tell me, why is it necessary to have a Parliamentary Bar?"

VII

Minor Works

There were a certain number of works written during the period under discussion which might be supposed to contain some constitutional theory, but which in fact contain none, or next to none. They can be mentioned conveniently in the form of a catalogue.

(1) Gascoigne's "Theological Dictionary."[42] The date of this is between 1405 and 1458. It is an interesting historical document illustrating the condition of the times, especially in relation to ecclesiastical affairs, but it contains no constitutional theory. Such headings as "Lex," "Regnum Angliae," and "Reges," contain complaints of the litigiousness of the times, and references to current events, but nothing more.

(2) Edmund Dudley's "Tree of Commonwealth"[43] was written in 1509 when the author was suffering imprisonment before his judicial murder. The position that he occupied as one of Henry VII's first ministers classes the book as a first-rate authority, and his reflections on the social and religious condition of the country are of great importance to the historian. From our present standpoint it is of slight value. Its general form is that of an ethical treatise on the duties of kingship.

(3) Elyot's "Governour," 1531.[44] In spite of its title, this is primarily a treatise on education, and particularly on the education of the governing classes. Incidentally it contains a certain

42. "Liber Veritatum," selected passages edited by J. E. Thorold Rogers, Oxford, 1881.

43. Printed for the first and only time in a limited edition in 1859.

44. The Boke named the Governour. Devised by Sir Thomas Elyot, Knight. Published 1531 followed by several editions throughout the sixteenth century. An excellent critical edition by H. H. S. Croft (London 1880) and a good cheap reprint in Dent's Everyman's Library (London 1907).

amount of political theory, but of a perfectly general character. Like most of the ablest minds of his century, Elyot is a convinced adherent of the theory of absolutism as the only certain and proved instrument of governmental efficiency capable of overcoming the appalling disorders of the later Middle Ages. The title of book 1, chap. 2, is significant. "That one soveraigne governour ought to be in a publike weale. And what damage hath happened where a multitude hath had equal authorite without any soveraygne."

In fact, Elyot's argument is little else than a panegyric of monarchy—

> "Wherefore undoubtedly the best and most sure governaunce is by one kynge or prince, which ruleth only for the weale of his people to hym subiecte: and that maner of governaunce is beste approved, and hath longest continued and is moste aincient."[45]

It is perhaps noteworthy that he shows some appreciation for the nature of sovereignty in the general sense some fifty years before Bodin. A comparison between the political theory of the "Governour" and that of "Doctor and Student" (both works were published in the same year) furnishes an interesting commentary on the conflict between Roman law and absolutism on the one hand and English law on the other, so skilfully portrayed in Maitland's "English Law and the Renaissance."

(4) "A Discourse of the Common Weal of this Realm of England"[46] sounds at first very promising for our purpose, but is in fact quite the reverse. It is concerned entirely with the economic conditions of the country, and especially with the question of enclosures. Of great value to the economic historian, it contains little matter for the constitutional theorist.

(5) Aylmer's "Harborowe."[47] This is a reasoned reply to Knox's "Monstrous Regiment of Women." It is only incidentally constitutional, but it assumes the views on the subject then generally held. It asserts that the laws rule and not the king, i.e., that the king is under the law and has his judges to execute the law. Also that the king makes no laws, but only the honorable court of Par-

45. Bk. 1, ch. 2.

46. First printed in 1581. An excellent edition by Miss Lamond was published by the Cambridge University Press in 1893. She brings forward weighty arguments in favor of the view that it was written by John Hales in the year 1549.

47. John Aylmer, Bishop of London, "an Harborowe for Faithful and Trewe Subjects, agaynst the late blowne Blaste, concerninge the Government of women, wherein he confuteth all such reasons as a straunger of late made in that behalfe with a brief exhortation to obedience," 1559. The most important passage is quoted in full by *Hallam*, "Const. Hist.," 3rd edit., Vol. I, p. 381.

liament. The object of this is to show that any deficiencies of women in matters of law need be no objection to a queen regnant, because she does not make or execute the laws herself.

(6) Harrison's "Description of England."[48] All the portions of this dealing with the constitution were, with a certain amount of alteration in detail, borrowed from Smith's "Republica Anglorum," and have been described sufficiently above.

(7) It may be convenient in this place to add a short note on the Book of Common Prayer. It has been described as the most important political document of the sixteenth century. From certain points of view it may deserve the title, but hardly from that of our present subject. But there is one very striking fact about it, namely, the total absence in the entire liturgy of any reference to Parliament. Seeley has demonstrated that the permanence of Parliament is a capital change in our institutions that dates only from the period of the Restoration. During the Tudor period Parliament was not a fixed feature of our body politic with a permanent unity and a continuous history, but it was more like the old States-General of France, called together at rare intervals on occasions of particular importance. Seeley goes on to say:[49]

"In Queen Elizabeth's reign it would not have been natural, I think, in describing the government of England to mention Parliament at all. Not exactly that Parliament was subservient, but that in general Parliament was not there.

"Does not the church service put before us this phase of England? In the Litany, the work of Cranmer, all the institutions of the country are passed in review in a series of petitions, but Parliament, in our view incomparably the most important, is not mentioned. When he has prayed for the king, the royal family, the lords, and others of the Privy Council, the magistrates, and all the nobility, Cranmer is satisfied. If the Divine blessing rests on these it is enough, all is well.

"The prayer-book has no doubt a form of prayer for the high court of Parliament to be used when it is in 'session.' But here, too, the words chosen to describe its functions seem to apply not so much to a governing or government-making body, such as the modern Parliament is, as to a constituent assembly called together exceptionally to make fundamental changes—'We pray that all things may be ordered and settled by their edeavours upon the best and surest foundations.'"

In truth, the case is considerably understated in this passage. Seeley has overlooked the fact that the familiar prayer for the High Court of Parliament was not added to the liturgy until 1625.

48. Written as a supplement to *Holinshed's* "Chronicle." A magnificent illustrated edition was prepared for the New Shakespeare Society by F. J. Furnivall in 1877.

49. "Introduction to Political Science," p. 256.

Cranmer's original prayer-book and the subsequent recension at the opening of the reign of Elizabeth omit all reference to the central assembly—a circumstance that adds tenfold force to the argument.

VIII

Hooker

Richard Hooker, by universal consent named "the judicious," was the most eminent English publicist of the sixteenth century. Steeped in the new learning and a devoted admirer of Aristotle, he was the last of our great writers who really understood the standpoint of the scholastic philosophy. By nature a scholarly recluse, by training a theologian, he nevertheless so mastered the basic principles of law as to be entitled to no mean place among the great jurists. A writer of controversial works on subjects that are dead beyond possibility of resurrection, his writings live by virtue of the quality of their style and the profundity of their thought. He ennobled controversy by appealing in all cases to fundamental principles, and treating particular questions in the light of the principles so established; and so he is remembered when the treatises of his adversaries lie unopened by any but professed historians.

His great work, "Of the Laws of Ecclesiastical Polity," is primarily a defense of the position of the Church of England as against the Romanists on the one hand and the Calvinists on the other. It must be confessed that the Elizabethan settlement in matters of religion was badly in need of an intellectual apology. An empirical and politic effort of statesmanship, it was assailed on both sides by adversaries who could appeal to logical and far-reaching principles. Trent and Geneva were alike difficult to overcome in argument once their respective premises were conceded. "In medio tutissimus ibis," but the middle way is apt to appear full of ruts to fanatics who profess principles of universal validity. It is one of the cardinal merits of Hooker that he never seeks to justify the Church of England or the English limited monarchy as the outcome of any universal principle. They are justified as being what they are, not by pretending to be what they are not. Despite the great temptation, it would take us too far beyond the scope of this essay to discuss Hooker's general theory of law set forth in book i of the "Ecclesiastical Polity." The constitutional theory is contained in book viii. Needless to say it does not profess to be a constitutional treatise. It is merely concerned with answering "Their" (the Calvinists') "seventh assertion that unto no civil prince or governor there

may be given such power of ecclesiastical dominion as by the laws of this land belongeth unto the supreme regent thereof." In fact it is the most thorough, and the only really philosophic defense of our institutions that the sixteenth century produced. It contains in germ a large part of the "classical" theory originated by Locke, and it is hardly too much to say that it gave the tone to constitutional apologists for the next two hundred-fifty years.[50]

The book begins with an attack on the most anarchic of the papalist arguments, that the church and the commonwealth are two separate societies, each supreme in their separate spheres, with the implied corollary that in the event of dispute as to the ambit of the several jurisdictions the decision should belong to the pope by virtue of his divine right as the vicegerent of Christ. Into the details of the extremely good argument by which this position is confuted it is beside our present purpose to enter. The pith of it is perhaps contained in the epigrammatic sentence, "A commonwealth we name it simply in regard of some regiment or policy under which men live; a church for the truth of that religion which they profess." The conclusion is so clearly put as far as the English position is concerned that it may be quoted in full:[51]

"Wherefore to end this point, I conclude: First, that under dominions of infidels, the Church of Christ, and their commonwealth, were two societies independent. Secondly, that in those commonwealths where the Bishop of Rome beareth sway, one society is both the Church and the commonwealth; but the Bishop of Rome doth divide the body into two diverse bodies, and doth not suffer the Church to depend upon the power of any civil prince or potentate. Thirdly, that within this realm of England the case is neither as in the one, nor as in the other of the former two: but from the state of pagans we differ, in that with us one society is both the Church and commonwealth, which with them it was not; as also from the state of those nations which subject themselves to the Bishop of Rome in that our church hath dependency upon the chief in our commonwealth, which it hath not under him. In a word, our estate is according to the pattern of God's own ancient elect people, which people was not part of them the Commonwealth, and part of them the Church of God, but the selfsame people whole and entire were both under one chief Governor, on whose supreme authority they did all depend."

This argument having been disposed of, Hooker, with his perpetual longing for first principles, proceeds to discuss the "power of dominion." In no part of his work does he stand so clearly upon

50. *Sir James Fitzjames Stephen* (Horæ Sabbaticae Series, I, p. 154) went to the length of saying that *Locke's* "Essay on Civil Government" was almost entirely borrowed from Hooker.

51. Book viii, ch. 1, 7.

the dividing line between the medieval and the modern. There are, at least in the present writer's opinion, few analyses of the subject more worthy of consideration even at the present time. It is noteworthy that he generally uses the term dominion rather than sovereignty or imperium to express the idea of political power. In this he follows the practice of Fortescue and departs from that of the medieval jurists and the Renascence publicists. It is probable that he had read Bodin's "Commonwealth" because a quotation from it is given in a footnote to the "Supposed Fragment of a Sermon on Civil Obedience," but he appears to have been little influenced by Bodin's main argument. He allows force to the doctrine of power, but no such force as was given to it by Machiavelli and his followers. Absolute power is confined to one instance only—the case of conquest—again repeating the position both of Fortescue and Sir Thomas Smith. But even in that case the absolute power does not exist by reason of any sovereignty inherent in the state, but because conquest in a just and lawful war is a manifestation of divine providence. "For it is God who giveth victory in the day of war." So he argues that William the Norman assumed the title of Conqueror because he could have no title to such powers as he exercised by law, but solely by right of conquest.[52]

Subject to this solitary exception Hooker holds to the medieval doctrine that the law is above the king, not the king above the law. If the king's dominion is a lawful one, as it must be if it was not acquired by conquest, then it was conferred by law, and having so received it, he must hold it of and under the law. This leads directly to the question of the origin of political power. Upon that point the views of Hooker are of the greatest interest. He was apparently the first to expound in English the famous doctrine of the original contract; to be developed afterwards upon widely different lines by Hobbes and Locke, and to remain a potent element in our political thinking until the rise of the historical school and the triumph of the doctrine of evolution.[53]

The foundation of his view, repeated several times in slightly different terms, is that every independent multitude, before it was organized into a political society, had full dominion over itself under

52. Book viii, ch. VI, 1.

53. The theory of the original contract was first put into an effective and historically important form by *George Buchanan* ("De Jure Regni apud Scotos") in Scotland, and by *Du Plessis Mornay* ("Vindicae contra Tyrannos") in France. The best English account of the genesis of the theory is *Dr. Figgis'* "From Gerson to Grotius," p. 148 et seq., and his "Political Thought in the Sixteenth Century" in Camb. Mod. Hist., Vol. III, ch. 22.

God, and full power to choose the kind of government that it should have. It must be assumed that this power was exercised, and therefore "the cause of dependency is in that first original conveyance, when power was derived by the whole into one."[54]

Not only the cause, but the extent of the dependency, is shown by the articles of compact. No instance of such an original covenant is given; Hooker covering up any awkward historical deficiencies of this kind by the sage remark that the articles at the first beginning "for the most part are either clean worn out of knowledge or else known unto very few." However from his standpoint this is not very material because the first original conveyance is capable of indefinite modification by the consent of both parties, just as any everyday contract can be modified. The consent to the change may be given expressly, whereof the evidence is positive law, "or else by silent allowance famously notified through custom reaching beyond the memory of man." Here was clearly a theory apparently of universal validity, but singularly adapted to the position of the English constitution. The law was above the king because in the first place he derived his title from the law, and in the second place because he was one of the parties to a bilateral contract. Within the ambit allowed by law, he was free to do as he pleased, but the terms of the contract covered every express enactment and every immemorial custom, and not one tittle of these could he alter without the consent of the other party, viz., his subjects. This position is a far stronger guaranty of the rights of the governed than the theory that political power was a trust. The latter idea was a by-product of the conciliar movement in the fifteenth century. But the conciliar movement failed, and the claim of a general council to override the pope remained a claim and nothing more. A definite contract, moreover, was a more concrete thing than an implied trust. Besides, even a king would rather be

54. Book viii, ch. 11, 9. It is particularly noteworthy that Hooker uses the term "conveyance" and not "contract". *Dr. Figgis* ("Gerson to Grotius," p. 149) treats the theory of the original contract as a natural outcome of Feudalism, and asserts that "the feudal tie was essentially contractual." With all deference to so high an authority we think that this proposition cannot be maintained. Feudal law recognized differences of status with appropriate rights and duties attached, but its notions of contract were quite rudimentary. Even Blackstone as late as the eighteenth century treated contract, now rightly described as "the greediest of all legal categories," as a subordinate heading of the law of property and not as one of the fundamental divisions of the law. The large sphere occupied by the law of contract is in fact a mark of an advanced stage of civilization, and in modern Europe it dates from the industrial revolution and the growth of great commerce. See generally *Pollock* and *Maitland's* "History of English Law," book ii, ch. v.

accused of breaking a contract than branded as a defaulting trustee.

Then we get on to more delicate ground where Hooker was obliged to tread warily. Upon the conciliar idea a dishonest trustee could be deposed for breach of trust; but could a body politic withdraw in whole or in part the dominion conferred on the supreme governor by the original contract "if inconvenience doth grow thereby." Hooker answers in the negative, "saving where dominion doth escheat." The answer is not merely diplomatic but logically consistent with the theory. The terms of a bilateral contract cannot be altered by the unilateral act of either party. "Inconvenience" can only be prevented by a rigid examination of the terms of the contract before it is made.

If it be granted that the ruler may exercise authority in secular affairs what reasons can be alleged why he cannot do so in matters ecclesiastical, subject always to the like limitations? Hooker argues that there are no such reasons in the cases where the same people at the same time form both a church and a commonwealth. In this respect he has entirely overthrown the medieval view, and ranged himself alongside the thinkers of the Revival and the Reformation. Both lines of thought had to recognize the existence of the two authorities, ecclesiastical and civil, and the controversy was really upon the degree of authority to be conferred on either of them. As one of the greatest living authorities on the subject puts it:

"Probably the transition to the modern view was only possible because men pictured not two distinct communities but one society, which the medieval thinker regarded as essentially a church, the modern as essentially a state. This view is consecrated in the great work of Hooker. In the Middle Ages, ideally at least, Western Europe is one; in the sixteenth century the territorial state is the distinct and self-sufficient unit. The godly Prince is summus episcopus, in whom all jurisdiction centers; and the superiority—always in dignity, sometimes in fact—of the ecclesiastical functionaries, is gone for ever."[55]

Hooker "consecrates" the view in this scornful and emphatic language—

"A gross error it is to think that regal power ought to serve for the good of the body, and not of the soul; for men's temporal peace, and not for their eternal safety: as if God had ordained kings for no other end and purpose but only to fat up men like hogs, and to see that they have their mast?"[56]

The application of these general considerations to the English

55. *Figgis* in Camb. Mod. Hist., Vol. III, p. 742.
56. Book viii, ch. ii, 2.

constitution is clear and unequivocal. Hooker cannot choose but commend highly the wisdom of the founders of this commonwealth "wherein though no manner person or cause be unsubject to the king's power, yet so is the power of the king over all and in all limited, that unto all his proceedings the law itself is a rule."[57] There are great things and sundry which the king through his supreme power can do both in peace and war, at home and abroad, because these are permitted to him by law. But there are things equally great which he has no power to do without the consent of the lords and commons in Parliament assembled; he cannot change the nature of pleas, nor of courts, nor even restore blood; a fortiori, he cannot in any respect change the law itself. It is added, somewhat superfluously, that he cannot act contrary to the divine or the natural law, because these in Hooker's view, as in St. German's, would be equally binding upon the legislature itself.[58]

Further the same principles that apply to the secular law apply equally to the spiritual affairs of the church.

St. Ambrose is quoted as authority for the proposition that kings have dominion to exercise in ecclesiastical causes but according to the law of the church. The received laws of the church are as much law as the law of the state, and the king therefore has supreme authority within them, but against them none.[59]

The power that the king has in legislature is declared to rest principally in the strength of a negative voice, or in other words he is an integral portion of Parliament, and his power there is the power of veto.[60]

The next question that arises is whether the Parliament, being a merely temporal court, can legislate for the church and clergy in those things that are not repugnant to the divine law or the law of nature. Assuming—and this assumption is always the basis of his argument as applied to England—that the selfsame people are both the church and the commonwealth, Hooker has no doubt about the answer.

"The parliament of England, together with the convocation annexed thereunto, is that whereupon the very essence of all government within this kingdom doth depend; it is even the body of the whole realm; it consisteth of the king, and of all that within the land are

57. Book viii, ch. ii, 13. The reader will hardly need to be reminded of the parallelism between this sort of remark and Blackstone's perpetual references to the wisdom of our ancestors.

58. "In laws that which is natural bindeth universally, that which is positive not so": Book i, ch. x, 7.

59. Book viii, ch. ii, 17.

60. Book viii, ch. vi, 11.

subject unto him: for they all are there present, either in person or by such as they voluntarily have derived their very personal right unto. The parliament is a court not so merely temporal as if it might meddle with nothing but only leather and wool.[61]

The language of this passage is strikingly similar to that of Sir Thomas Smith, but it is not a quotation, and Hooker nowhere cites Smith as an authority. It may be taken as an embodiment of the view of representative government current in the Tudor period. It has an additional historical interest in that it implies that Hooker was not very clear in his mind as to the exact position of convocation. It is "annexed" to the Parliament, and the vagueness of this phrase suggests that his ideas on the subject were also vague. It might mean that he considered it proper, or at least expedient, that convocation should assent to a statute before it became binding on the clergy; but this is mere conjecture for he does not elucidate the matter further.

Finally Hooker summarizes his whole theory of legislation in England in this passage:

"Which laws being made amongst us, are not by any of us so taken and interpreted, as if they did not receive their force from power which the prince doth communicate unto the parliament, or to any other court under him, but from power which the whole body of this realm being naturally possessed with, hath by free and deliberate assent derived unto him that ruleth over them, so far forth as has been declared. So that our laws made concerning religion, do take originally their essence from the power of the whole realm and church of England, than which nothing can be more consonant unto the law of nature and the will of our Lord Jesus Christ."[62]

IX

Foreign Observers

The English constitution has always been a subject of great interest to European publicists, especially from the time of Montesquieu to the French Revolution when it was the fashion to treat it abroad with the admiration then so freely accorded to it in its native land. In the sixteenth century it had not yet become an object of veneration, but the comments upon it are of none the less interest on that account. Three writers appear to be deserving of particular mention.

(1) Phillippe de Comines (died 1511). Comines has been quoted as an admirer of English institutions, but his knowledge of

61. Book viii, ch. vi, ii.
62. Book viii, ch. vi, ii.

the matter does not appear to have been particularly great. His references to it[63] are merely incidental, and he develops no systematic or general views. He does indeed remark that of all the realms of the earth of which he has knowledge England is the country where public affairs are best ordered, where there is least disorder, and where no buildings have been demolished in war. The point that seems to have impressed him above all others was that the consent of Parliament was necessary for extraordinary taxation.

(2) The Relation of England.[64] This book is apparently a report on the state of England made to the Doge and senate by some Venetian who had accompanied an embassy to England—a kind of secret service document. It is entertaining in the highest degree. Perhaps we may be pardoned for going beyond the bounds of our subject in quoting the following passage as a specimen.

"The English are great lovers of themselves, and of everything belonging to them; they think that there are no other men than themselves, and no other world but England; and whenever they see a handsome foreigner, they say that "he looks like an Englishman" (p. 20).

The matters that struck the writer particularly were that the Roman law was of no force here, and that legal procedure was carried on by "the opinion of men" and not by writing. The three estates are described as the popular, the military, and the ecclesiastical. The people were held in little more esteem than if they were slaves, and the clergy have supreme sway over the country both in peace and war. The Venetian notes the great prevalence of crime, and attributes it to the paucity of the judicial establishment. He observes that "if the king should propose to change any old established rule, it would seem to every Englishman as if his life were taken from him," though he sapiently adds, "I think that the present King Henry will do away with a great many, should he live ten years longer."

Generally speaking he is impressed with the strength of the position both of the crown and of the church. "There is not a foot of land in all England which is not held either under the king or the church." He is particularly struck by the fact that the nobles do not exercise jurisdiction in their counties, and that all

63. "Memoirs," book iv. ch. 1, and book v, ch. 19.

64. "A Relation or rather a True account of the Island of England: with sundry particulars of the customs of these people, and of the royal revenues under King Henry the Seventh about the year 1500." Translated by Miss C. A. Sneyd (London, The Camden Society, 1847). It is a delightful book, far too good to be buried in the publications of a learned society. It might with great advantage be included in one of the series of popular reprints.

jurisdiction and all fortresses are in the hands of the crown except the temporal jurisdiction of Durham. Finally Parliament is not thought worthy of being mentioned at all. It is altogether an extremely valuable first-hand account by an unprejudiced and outspoken foreigner.

(3) Bodin. Last and most important of all comes Bodin's "Commonwealth."[65] This is not the place to attempt any general description of Bodin's theory of sovereignty.[66] It is perfectly evident however that the position of parliaments, and the English Parliament especially, troubled him considerably, and he found it very difficult to fit them into his theory in any satisfactory manner.[67] In general he regards them as merely having a right to present petitions to the king which the king may grant or refuse at his pleasure, and therefore instead of being a derogation from his majesty they prove it the more clearly. The chief purpose of their existence is that the king may hear the requests of the people from the people themselves. Bodin would have appreciated Bagehot's remark that the parliaments were necessary to the medieval kings as their sole "feelers" of public opinion. But he is evidently not quite happy in his mind on the subject because he inserts the saving clause that if the king were subject to assemblies of the people he would no longer be a king or a sovereign, and the state would be an aristocracy and not a monarchy.

It was an essential point in Bodin's theory that sovereignty was one and indivisible; it would have been inconceivable to him that certain functions of government should have been vested in some organs, and others in others, except by temporary delegation from the sovereign authority. The English theory as set forth, for instance, by Sir Thomas Smith that the prerogative of making war and peace was vested in the king alone, but that the function of legislation was reserved for the king in Parliament, would have appeared to him purely nonsensical. The half-lights of actual practice did not fit into the rigid and uniform glare of his coloring. Nevertheless, he evidently went to some trouble to discover the actual facts about our institutions, though he seizes with avidity

65. An English translation by Richard Knolles was issued in 1606 under the title of "The Six Bookes of a Commonweale." It was never reprinted and is exceedingly scarce.

66. A good list of authorities on Bodin is given in Encylopaedia Britannica, 11th edit., article "Bodin." The article itself is not altogether satisfactory. To these may now be added *R. Chauvire* "Jean Bodin: auteur de la Republique" (Paris, Champion, 1914).

67. Book i, ch. 9, p. 136 et seq. of the first edition (written in French) of 1576. The Latin version was published in 1586.

upon any circumstance that tends to show that the king was sovereign and the Parliament subordinate. The circumstances of the Tudor monarchy when Parliament met occasionally and usually acted submissively, would give him good reason to place it in the same category as the States General of France. A foreigner who had never visited England would hardly, apart from any preconceived theory, be able to appreciate the true inwardness of Tudor statecraft.

He admits that the Parliaments commonly sat regularly every third year,[68] and that they seemed to have great liberty; but he notes—

(1) That they proceed by way of supplication and request;

(2) That Elizabeth refused to appoint a successor at the request of Parliament; and

(3) That Parliament can only be convened and dissolved at the express command of the king. Facts such as the statute passed to authorize the marriage contract between Philip and Mary he dismisses as matters of politic expediency, and not as derogations from sovereignty.

But after all this he is forced to face two very awkward facts to which he does not and could not supply anything but an evasive and feeble reply. Nevertheless it is all to Bodin's honor that he does attempt to face the facts as he knew them fairly, and does not gloss them over or leave them unnoticed after the manner of so many protagonists of a pet theory.

The first is that laws enacted by Parliament cannot be repealed except by authority of Parliament. Against this Bodin quotes the authority of an English ambassador, Dr. Dale, that the king did disannul such laws and asserts that Henry VIII had done so. Of course he was wrong, but it may be urged in extenuation that an English lawyer of the period would have experienced no little difficulty in defining the precise limits of the king's dispensing power, and of the legislative powers of the king in Council. It was necessary more than a century later to enact expressly in the Bill of Rights "That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal."

The second point is that the estates of England suffer no extraordinary charges or subsidies to be laid upon them without the consent of Parliament. To this Bodin makes the very weak reply

68. This of course was not true during the reign of Elizabeth.

that other kings are under similar disabilities, and that in case of pressing necessity the king ought to be able to impose taxes without the assembly of the estates. Such an answer scarcely merits refutation.

X

Conclusion

The termination of the sixteenth century and of the reign of the Great Queen marks the end of an historical period in England more precisely than arbitrary dates usually do. It is also the end of a fairly distinct period in our constitutional theory and political thought. As far as our institutions are concerned, a time of calm has terminated and one of conflict begins. The writers of the age mostly belong to two well-defined groups. On the one hand there are the practical statesmen who write from personal observation, Fortescue and Smith; on the other the successors of the medieval jurists, St. German and Hooker. Both classes almost disappear with the end of the age. Hooker stands on the bridge that joins the two periods, and his penetrating mind discerned the theory that was to prevail for long after. But for the rest the atmosphere changes completely. Constitutional theory became a weapon in current political controversy. The medieval ideas were forgotten, and we pass into a time when the thinkers were cast in a different and sometimes entirely new mould. Coke and Selden developed the legal theory in a way that no previous writers had attempted. The Interregnum produced a welter of opinions and speculations such as was never seen in England again at all, or anywhere else until the French Revolution; and Hobbes, Locke, Harrington, and Algernon Sidney wrote definite and comprehensive treatises on political theory. Such things were not characteristic of the England of the sixteenth century.

(B)—CANADIAN CONSTITUTIONAL LAW

DOMINION AND PROVINCIAL POWERS UNDER THE BRITISH NORTH AMERICA ACT, 1867

By Angus J. McGillivray[1]

The distribution of powers between the Dominion and the provinces is stated to have been made on the principle of giving exclusively to the provinces specific powers, while the Dominion receives the residuum of power not so granted. This arrangement constitutes one of the principal differences between the Canadian and the American constitutions, the scheme adopted in the American constitution being the express grant of powers to the United States, while each state received the remaining powers not so granted. In this regard Viscount Haldane, L. C., may be referred to as saying in *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Company, Limited*:[2]

"The British North America Act of 1867 commences with the preamble that the then Provinces had expressed their desire to be federally united into one Dominion with a constitution similar in principle to that of the United Kingdom. In a loose sense the word 'federal' may be used, as it is there used, to describe any arrangement under which self-contained states agree to delegate their powers to a common government with a view to entirely new constitutions even of the states themselves. But the natural and literal interpretation of the word confines its application to cases in which these states, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions. Now, as regards Canada, the second of the resolutions, passed at Quebec in October, 1864, on which the British North America Act was founded, shows that what was in the minds of those who agreed on the resolutions was a general government charged with matters of common interest, and new and merely local governments for the Provinces. The Provinces were to have fresh and much restricted

1. [The author was born of Scottish parents at Dunmaglass, Antigonish County, Nova Scotia; was educated in the free common schools of that province, and in St. Francis Xavier's College, Antigonish, from which he graduated as B.A. He is a barrister by profession, having been admitted to the bar of the province in 1879. The author taught school for several years before and after becoming articled as law clerk at Antigonish in the office of the late Hon. Hugh McDonald, who represented the County of Antigonish in the Dominion Parliament as Minister of Militia. He became a member of the Canadian Civil Service at Ottawa in 1892, and is now a legal officer and law librarian of the Justice Department, Ottawa.—Ed.]

2. [1914] A. C. 237 (252-53).

constitutions, their governments being entirely remodeled. This plan was carried out by the Imperial statute of 1867. By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order, and good government of Canada, without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the provincial legislatures by s. 92. There followed an enumeration of subjects which were to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it. The Act, therefore, departs widely from the true federal model adopted in the Constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to their people. Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions, and so must be accepted as a treaty of union among the then provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and provincial governments with defined powers and duties, both derived from the Act of the Imperial Parliament which was their legal source."

I

The following subject classes are assigned by sec. 91 exclusively to the central authority:

(1) The public debt and property; (2) Regulation of trade and commerce; (3) The raising of money by any mode or system of taxation; (4) Borrowing money on the public credit; (5) Postal services; (6) Census and statistics; (7) Militia, military and naval service and defense; (8) The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada; (9) Beacons, buoys, lighthouses, and Sable Island; (10) Navigation and shipping; (11) Quarantine and the establishment and maintenance of marine hospitals; (12) Seacoast and inland fisheries; (13) Ferries between a province and any British or foreign country, or between two provinces; (14) Currency and coinage; (15) Banking, incorporation of banks, and the issue of paper money; (16) Savings-banks; (17) Weights and measures; (18) Bills of exchange and promissory notes; (19) Interest; (20) Legal tender; (21) Bankruptcy and insolvency; (22) Patents of invention and discovery; (23) Copyrights; (24) Indians and lands reserved for the Indians; (25) Naturalization and aliens; (26) Marriage and divorce; (27) The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters; (28) The establishment, maintenance, and man-

agement of penitentiaries; (29) Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The legislature in each province has, by sec. 92, exclusive jurisdiction over the following classes of subjects:

(1) The amendment from time to time, notwithstanding anything in this Act, of the constitution of the province, except as regards the office of lieutenant governor; (2) Direct taxation within the province in order to the raising of a revenue for provincial purposes; (3) The borrowing of money on the sole credit of the province; (4) The establishment and tenure of provincial offices and the appointment and payment of provincial officers; (5) The management and sale of the public lands belonging to the province and of the timber and wood thereon; (6) The establishment, maintenance, and management of public and reformatory prisons in and for the province; (7) The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutes in and for the province, other than marine hospitals; (8) Municipal institutions in the province; (9) Shop, saloon, tavern, auctioneer, and other business in order to the raising of a revenue for provincial, local, or municipal purposes; (10) Local works and undertakings *other than such as are of the following classes*:

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(b) Lines of steamships between the province and any British or foreign country;

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces.

(11) The incorporation of companies with provincial objects; (12) The solemnization of marriage in the province; (13) Property and civil rights in the province; (14) The administration of justice in the province including the constitution, maintenance, and organ-

ization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts; (15) The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section; (16) Generally all matters of a merely local or private nature in the province.

By section 93 the provinces are given exclusive authority to make laws for education, with protection for denominational schools, the dissentient Protestant and Roman Catholic schools in Quebec, and the rights and privileges of Protestant or Roman Catholic minorities in relation to education. The section reads:

"In and for each province the legislature may exclusively make laws in relation to education, subject and according to the following provisions:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union;

(2) All the powers, privileges, and duties, at the union, by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the union or is thereafter established by the legislature of the province an appeal shall lie to the Governor General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;

(4) In case any such provincial law, as from time to time seems to the Governor General in Council requisite for due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for due execution of the provisions of this section and of any decision of the Governor General in Council under this section."

The above sections relating to the distribution of legislative powers between the Dominion and the provinces must be read together, and the language of one section interpreted and, when necessary, modified by that of the other.[3]

3. *Citizens Insurance Co. of Canada* v. *Parsons*, [1881] 7 A. C. 96, 109; approved in *Russell* v. *The Queen*, [1882] 7 A. C. 839.

In conferring upon the provinces the power of exclusively legislating upon any class of subjects, the effect is to make the provincial legislatures supreme and independent of any control by the Dominion when legislating upon any of those subjects. The provinces have an equality of jurisdiction in this respect. In the case of *The Liquidators of the Maritime Bank of Canada* v. *Receiver General of New Brunswick*,[4] it was said by Lord Watson delivering the judgment of their Lordships:

"Their Lordships do not think it necessary to examine in minute detail the provisions of the Act of 1867, which nowhere professes to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing between the Dominion and the provinces all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of those powers, property and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But in so far as regards those matters which by section 92 are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act . . . . The Act places the constitutions of all the provinces within the Dominion on the same level, etc."

But the exclusive legislative authority conferred by sec. 91 of the British North America Act on the Dominion Parliament is intended, as appears from the provision "notwithstanding anything in this Act," contained therein, to be paramount so long as it relates to those matters over which it is given such control, even when it trends upon matters assigned by sec. 92 to a provincial legislature.[5]

The conferred power is not hindered by the fact that its exercise would result in modifying civil rights in the province.[6] In the case of *La Compagnie Hydraulique De St. François* v. *Continental Heat & Light Company*,[7] their Lordships of the Privy Council remarked that several decisions of that Board have established

4. [1892] A. C. 437 (441-42).
5. *Tennant* v. *Union Bank of Canada*, [1894] A. C. 31, 45; *Grand Trunk Railway Co.* v. *Attorney General of Canada*, [1907] A. C. 65, 68; *City of Toronto* v. *Canadian Pacific Railway Co.*, [1908] A. C. 54.
6. *Tennant* v. *Union Bank of Canada*, supra.
7. [1909] A. C. 194 (198).

that where a given field of legislation is within the competence both of the Parliament of Canada and of the provincial legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly were in that case, the Continental Heat & Light Company having been empowered under a Dominion statute[8] to supply, sell, and dispose of gas and electricity, while the other company was under later Quebec statutes empowered to do the same things in the locality chosen by the former. The Dominion power to incorporate the company was derived from sec. 91 (29), the province having the power to incorporate companies with provincial objects only under sec. 92, (11). In the case of the *Attorney General for Ontario* v. *Attorney General for the Dominion*,[9] it was said by their Lordships, among other things, in effect, that although the enactments of the Dominion Parliament, in so far as within its competency, must override provincial legislation, the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute whether the same is within the competency of the provincial legislature to enact or not. The repeal of a provincial act by the Dominion Parliament can only be effected by repugnancy between its provisions and the enactments of the Dominion, and if the existence of such repugnancy should become a matter of dispute the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country.

The veto power of the Dominion government, by which the Governor General in Council can disallow provincial acts within a year after being passed, is not now as frequently exercised as in the early days of confederation before certain decisions of the Privy Council had clearly declared that under the British North America Act the legislature of each province was supreme in its power of legislation in respect to any of the subjects exclusively assigned to it by that Act. The tendency is to limit the exercise of that power to cases where the provincial legislature exceeds its legislative authority, and even as regards such ultra vires legislation, the central authority is likely to become more reluctant to interfere by the exercise of the power of disallowance, as intimated by Professor Lefroy.[10] The power of disallowance, if an act be intra vires, on the ground that it is unfair, or unjust, or contrary to the principles

8. 60 and 61, Vic., c. 72.
9. [1896] A. C. 348.
10. "Canada's Federal System," (1913) pp. 34 et seq.

which ought to govern in dealing with private rights, may technically exist, but its exercise is generally declined under the advice of the Minister of Justice. Thus, in 1904, a Manitoba statute respecting the town of Emerson[11] was attempted to be disallowed as unfairly dealing with private rights, but the Minister refused to disallow it, saying that "he does not consider that he can consistently with the practice which has grown up in such cases, review the propriety of the legislation, or recommend it for disallowance on the ground of its supposed injustice to any individual." The present Minister of Justice, Mr. Doherty, in his report dated January 20, 1912, as to the Alberta Act, 1910, c. 9, said in advising against disallowance:

"There was considerable discussion at the hearing as to the practice and precedents in respect of disallowance of legislation by reason of unjust provisions or because of its interference with vested rights or the obligations of contract, and a recent report of the predecessor in office of the undersigned was quoted as showing that the Governor General should in no case be advised to disallow for such reasons. It is true, as has been frequently pointed out, that it is very difficult for the government of the Dominion, acting through the Governor General, to review local legislation or consider its qualities upon questions of hardship or injustice to the rights affected, and this is manifest not only by expressions in reports of the ministers, but also by the fact that but a single instance is cited in which the Governor General has exercised the power upon those grounds alone. The undersigned entertains no doubt, however, that the power is constitutionally capable of exercise, and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights of property through the operation of local statutes intra vires of the legislatures. Doubtless, however, the burden of establishing a case for the execution of the power lies upon those who allege it, and, although the undersigned is not prepared to express approval of the statute in question, which he feels must be regarded as a most remarkable execution of legislative authority, he is nevertheless not satisfied that a sufficient case for disallowance has been established either on behalf of the bondholders, the bank, or the companies, especially when it is considered that the legislation sanctioned by the Assembly evidences as it does a very elaborate and important feature in the policy of the local government."

A previous instance of like importance, considering the interests involved, may be referred to as being furnished by the strong attempt made to obtain the disallowance of an Ontario act, "The Power Commission Amendment Act, 1909," on the ground that it unjustly interfered with vested rights, and would affect injuriously

11. 3 and 4, Edw. VII, c. 14.

not only Ontario but Canadian interests. But the Ontario Attorney General took strong objection to its disallowance, and Sir Allen Aylesworth, in his report as Minister of Justice against disallowance, said:

"In the opinion of the undersigned, a suggestion of the abuse of power, even so as to amount to practical confiscation of property, or that the exercise of a power has been unwise or indiscreet, should appeal to your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such a case is in the words of Lord Herschell, an appeal to those by whom the legislature is elected."

It may also be added that Sir Allen's predecessors as Ministers of Justice, Hon. David Mills and Hon. Sir Charles Fitzpatrick, had expressed similar views in regard to the power of disallowance.

As regards provincial acts which are intra vires it may be said, therefore, that the policy of not disallowing them has become settled, notwithstanding the inherent power of the Dominion government to disallow them for reasons which justify the exercise of that power. In the case of *Bank of Toronto* v. *Lambe*,[12] their Lordships of the Privy Council said:

"Their Lordships have to construe the express words of an act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

In conclusion it is to be observed that a provincial act must not be disallowed in part or conditionally, but must, if the veto power is to be exercised at all, be disallowed altogether, and within the period of one year after its enactment. But the allowance of provincial legislation by the Dominion government is not, in all cases, an admission of the validity of such legislation, as was pointed out by Sir John Thompson, in his report of January 18th, 1889, on the disallowance of the Quebec Act respecting district magistrates, affirmed by the Governor General in Council on the 22nd of that month.

12. [1887] 12 A. C. 587.

II

The recent exercise on the 30th of May, 1918, of the power of disallowance of a British Columbia act, c. 71 of 7 and 8, Geo. V (1917), so amending a prior British Columbia act, the Vancouver Island Settlers' Rights Act, 1904, as to infringe upon property rights, reasserts its existence under the British North America Act and gives rise to the hope that the powers of provincial legislatures under our Constitution will not in future be permitted at any time by a fostering laxity to triumph in brazen confiscation.

All Dominion acts are subject to be vetoed by the King in Council within two years after the receipt thereof by the Secretary of State.

For many years after the coming into force of the British North America Act, 1867, the respective powers of the Dominion, and of the provinces under it, were in many instances subject, as they are now, to being questioned in the courts and to be finally settled only by the decisions of the highest court of appeal for Canada, the Judicial Committee of the Privy Council of England. And although the effects of judicial decisions have during those years speedily blazed the way by interpreting the true and proper meaning of the Canadian constitution as it affects those powers, the end of legal controversies in regard to them is not yet. A passing reference to some of the cases on the Act has already been made, and only such a reference as is compatible with moderation in the use of the privilege complimentally extended to me needs be expected in this paper, although every such case decided generally serves to solve more than one question while illustrating particularly the application and effect of some one or other of the provisions of sections 91 and 92 of the Act. A brief notice in plain words of a few such leading cases is respectfully submitted.

The case of *L'Union St. Jacques De Montreal* v. *Belisle*,[13] an appeal from the Court of Queen's Bench for the Province of Quebec, decided the question whether the Act, 33 Vict., c. 58, passed by the Province of Quebec for the relief of a benefit society in embarrassed circumstances arising from improvident management, was one which was exclusively reserved to the Dominion under the 91st section, sub-section 21, of the British North America Act relating to bankruptcy and insolvency. The Court of Queen's Bench held that the Act was so reserved to the Dominion, and was therefore ultra vires of the provincial legislature, a minority of that court dis-

13. [1874] L. R., 6 P. C. 31.

senting. The Privy Council held that the Act was intra vires as relating to "a matter merely of a local or private nature in the province," assigned exclusively by the 92nd section, subsection 16, of the British North America Act, to the province, and did not fall within the exclusive legislative competency of the Dominion as a matter relating to bankruptcy and insolvency. The judgment of the court below was therefore reversed. It may be here observed that quite frequently important Canadian cases as to the distribution of powers have been decided by the sole effect to be given to the same respective provisions of the British North America Act that were interpreted in this case.

Another appeal from the Court of Queen's Bench for the Province of Quebec, affirming a judgment of the Superior Court for Lower Canada to the Privy Council, which may be included in this notice, is *Angers* v. *Queen Insurance Company*,[14] in which the construction of certain clauses of the provincial Act, 39 Vic., c. 7, came before their Lordships. The clauses in question imposed a tax upon certain policies of assurance and certain receipts or renewals.

Section 91 of the British North America Act provides that:

"It shall be lawful for the Queen, by and with the consent of the Senate and House of Commons to make laws for the peace, order, and government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:

2. The regulation of trade and commerce.

3. The raising of money by any mode or system of taxation."

Section 92 of the British North America Act reads:

"In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:

2. Direct taxation within the province, in order to the raising of a revenue for provincial purposes.

9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

The judgment appealed from, which was that the tax imposed was not authorized by sec. 92, ss. 2, 9, although the payments to be made under the provincial Act were required to be made in terms for a license, and to be made by means of one or more adhesive stamps,

14. [1878] 3 A. C. 1090.

was affirmed by the Privy Council. In delivering judgment the Master of the Rolls (Sir G. Jessel) said, inter alia:

"The sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorize the statute which is under consideration. . . . . There is a multitude of authorities to show that such a stamp imposed by the legislature is not direct taxation. . . . . As regards judicial interpretation there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There again they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant."

Their Lordships were unable to find an act providing that the provincial Act was a license act at all. They say:[15]

"It is nothing more nor less than a simple stamp act on policies with provisions referring to a license, because it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license."

The Act was not, therefore, authorized by subsec. 9 of sec. 92 of the British North America Act. The imposition of the stamp duty could not also, in their Lordship's opinion, be authorized as direct taxation under subsection 2 of said section 92.

In *Valin* v. *Langlois*,[16] it was decided by their Lordships that the Dominion Parliament has the power to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the provincial legislatures. The Dominion Controverted Elections Act, 37 Vict., c. 10, conferring upon the provincial courts jurisdiction with respect to elections to the Dominion House of Commons, was, therefore, held to be valid.

In *Cushing* v. *Dupuy*,[17] the Dominion enactment, 40 Vict., c. 41, s. 28, providing that the judgment of the Quebec Court of Appeal in matters of insolvency should not be subject to appeal to Her Majesty's Privy Council, although Art. 1178 of the Civil Procedure Code of Quebec permits such appeal, was competent to the Dominion Parliament notwithstanding the exclusive powers of the provinces as to property and civil rights therein under sec. 92 of the British North America Act; inasmuch as sec. 91 gives the

15. At p. 1099.
16. [1879] 5 A. C. 115.
17. 5 A. C. 409.

Dominion jurisdiction as to "bankruptcy and insolvency," Sir Montague Smith in delivering judgment remarking that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property. The case is in the class of those important decisions of the Privy Council that the Dominion Parliament, in legislating as to matters falling within its exclusive authority under sec. 91 of the British North America Act, may interfere with property and civil rights and procedure within the provinces, where to do so becomes necessary to the exercise of the powers so exclusively assigned to it.

In *Citizens Insurance Co.* v. *Parsons,*[18] the appellants attacked an Ontario statute, 39 Vict., c. 24, intituled, "An Act to Secure Uniform Conditions in Policies of Fire Insurance," infringing the authority of the Dominion as regards trade and commerce under sec. 91 of the British North America Act, but the Act was held to fall within sec 92 (13) relating to property and civil rights within the province, and not within sec. 91 (2) assigning the regulation of trade and commerce to the Dominion. The principle of construction was pointed out in this case that the first question to be considered in determining whether legislation is comprised within the power given to a province or to the Dominion is whether the Act in question falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the provinces. If it does then the further question would arise whether the subject of the Act does not fall within one of the enumerated classes of subjects in section 91. If the Act does not fall within any of the subjects of section 92 no further question can arise as to the rights of both the provinces and the Dominion, and the question then becomes narrowed down to the single consideration whether the Act falls within any of the powers given to the Dominion.

The next case in which this principle of construction was applied was in *Russell* v. *The Queen.*[19] In this case the authority of the Dominion Parliament to enact temperance legislation was sustained on the ground that its object was to promote temperance throughout Canada by regulating the liquor trade therein, and was comprised in section 91 (1) of the British North America Act, empowering the Dominion Parliament to make laws for the peace, order, and good government of Canada, notwithstanding that it prohibited the sale in the provinces of intoxicating liquors, except

18. [1881] 7 A. C. 96, 45 L. T. N. S. 721.
19. [1882] A. C. 829.

in whole quantities or for certain specified purposes, and regulated the liquor traffic in the excepted cases. Their Lordships did not think that the Temperance Act in question belonged to the class of subjects, "property and civil rights," nor did it belong to the class of subjects coming within section 29 (16), "all matters of a merely local or private nature in the provinces," or to sec. 92 (9) under which the power to grant "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes," is assigned to the provincial legislatures.

In the subsequent liquor case of *Hodge* v. *The Queen,*[20] this case was explained and approved, and followed in *Attorney for Ontario* v. *Attorney General of the Dominion.*[21]

In *Hodge* v. *The Queen,* supra, a provincial liquor license act, c. 181, R. S. of Ontario, 1877, which made police or municipal regulations of a merely local character for the good government of taverns, etc., was held to be within the powers of the provincial legislature under sec. 92 (8-15 and 16) of the British North America Act, and did not infringe the exclusive power of the Dominion Parliament with respect to the regulation of trade and commerce, sec. 91 (2); and the principle illustrated in *Russel* v. *The Queen,* and in *Citizens Insurance Company,* supra, was there again expounded that "subjects which in one aspect and for one purpose fall within section 92 may in another aspect and for another purpose fall within section 91." As stated by A. H. F. Lefroy in his book,[22] "there have been very numerous decisions in Canadian courts holding provincial legislation of a local, sanitary, or police character valid, notwithstanding any effect it might have on particular trades," and many cases are pointed out by him in this connection in a footnote. He also makes, in that connection, what he regards as an apposite citation from Story, on the Constitution of the United States, pointing out, however, in a footnote, that the power of Congress is not so wide as the Dominion power, as it is to regulate commerce with foreign nations and among the several states and with the Indian tribes.[23] The case constitutes one of the leading expositions of the British North America Act, being authority for the principle that a provincial legislature may confide by statute to a municipal institution or body of its own creation authority to

20. 9 A. C. 117.
21. [1896] A. C. 348.
22. "Canada's Federal System," (1913) pp. 235-36.
23. U. S. Constitution, Art. 1, sec. 8 (3).

make by-laws or regulations as to subjects specified in the enactment with the object of carrying it into effective operation. It was contended that the Imperial Parliament had conferred no authority on the local legislature of Ontario to delegate its powers to others; in other words that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body alone, the maxim, "delegatus non potest delegare," being relied on. As to this their Lordships say:[24]

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

A large number of other cases can be cited as authority for the plenary character of the legislative powers of the Dominion Parliament and of the provincial legislatures.[25]

III

If the Canadian Constitution had not conferred those plenary powers upon the Dominion and provincial legislatures within the area of their respective jurisdictions it would not be "similar in principle to that of the United Kingdom," as it is said to be in its introductory recital. The Imperial Parliament is the supreme legislative authority, not only in the United Kingdom but also throughout the whole British Empire, and there is no legal limit to its

24. At p. 132.

25. For instance, *Maritime Bank* v. *Receiver General*, [1892] A. C. 442; *Dobie* v. *Temporalities Fund*, L. R., 7 A. C. 146; *Reg.* v. *Robertson*, 6 Can. Sup. Ct. Rep. 65; *Lynch* v. *Canada N. W. Land Co.*, 19 Can. Sup. Ct. Rep. 212; *Re Goodhue*, 19 Grant's Ch., U. C. 386; *Reg.* v. *Brierly*, 14 Ont. Rep. 532.

power of making and unmaking laws.[26] And it may be here further observed that although, generally speaking, once jurisdiction is conceded to a Canadian legislature, federal or provincial, its will is omnipotent according to British theory and knows no superior (Mowat, A. G. (arguendo) in *Severn* v. *Reg.*[27]). The jurisdiction conferred on either by the British North America Act, 1867, in effect disappears before the paramount authority of the Imperial Parliament when it clearly extends its legislation to Canada or to a province thereof in matters falling within that jurisdiction. Thus sec. 2 of the Colonial Laws Validity Act, 1865, provides:

"Any colonial law, which is or shall be repugnant to the provisions of any act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of Parliament, or having in the colony the force or effect of such act, shall be read subject to such act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

Section 3 of that Act reads:

"No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such act of Parliament, order, or regulation, as aforesaid."

There is some analogy between this paramount authority of the Imperial Parliament and the predominance of Dominion legislation over provincial legislation with which it conflicts. Dominion legislation, in so far as it is intra vires, is of paramount authority even though it trenches upon provincial legislation. The general supplementary power of legislation conferred by sec. 91 upon the Dominion Parliament to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by section 92 to the provinces, predominates also over the provincial powers of legislation under section 92, whenever the Dominion legislation in that behalf attains such dimensions as to affect the body politic of the Dominion. This paramountcy has been in the more recent years expressed by the Privy Council Board in the formula, "Where a given field of legislation is within the competence of both the Dominion and provincial legislatures, and both have legislated, the Dominion enactment must prevail."[28]

26. *Halsbury* "Laws of England," Vol. 21, p. 616.
27. 2 S. C. R. 81.
28. *Tennant* v. *The Union Bank of Canada*, [1907] A. C. at p. 68; *Crown Grain Co.* v. *Day*, [1908] A. C. at p. 507; *City of Toronto* v. *Bell Telephone Co.*, [1905] A. C. 52; *La Compagnie Hydraulique de St. François* v.

Dominion enactments which are only ancillary to legislation coming under the classes of subjects assigned to the Dominion are of equal authority with Dominion enactments expressly authorized as falling within those classes of subjects, provided such ancillary legislation is implied as being necessary to carry out any of the enumerated powers under section 91, so as to ensure their implicit exercise by the Dominion Parliament.[29]

The analogy between the paramount authority of the British Parliament over Dominion and provincial legislation and that of the Dominion over provincial legislation extends only to the case of conflicting legislation. It should be observed, before leaving the consideration of this subject, that a very eminent Canadian jurist, the late Sir John Thompson, expressed strong doubt that an English act of Parliament extending to a colony, passed before the British North America Act, 1867, was enacted, would have the effect of overriding a Canadian act passed in the exercise of any one of the powers conferred under sections 91 and 92 of that Act. His opinion supporting the view that such an act would have that effect is elaborated by him with his usual masterly power of discussion in his report, approved by His Majesty in Council on the 17th of August, 1889, contained in Hodgin's "Dominion and Provincial Legislation,[30] as to the Copyright Act, passed during the Dominion Session of 1889, but which was not assented to by Her Majesty afterwards because it dealt with a subject as to which imperial legislation extending to all Her Majesty's possessions had existed before it was passed by the Dominion Parliament in pursuance of its powers under 91 (23).

One or two extracts from the said report of Sir John Thompson as Minister of Justice will serve to show its main purport. Inter alia he says:[31]

"For reasons which will not be dilated on at length in this report, the copyright system heretofore in force (under the Imperial and Canadian legislation) has been found to be most unsuitable to Canada,

---

Continental Heat & Light Co., [1909] A. C. 1014. As regards the last two of these cases, it should be observed that both of the companies in question were Dominion, and that, therefore, they must be in this respect distinguished from the ordinary cases bearing on the question. See, also, *Huson* v. *So. Norwich Township*, 24 Can. Sup. Ct. 149; *Citizens Ins. Co.* v. *Parsons*, 4 C. S. C. Rep. 242; *Fredericton* v. *Reg.*, 3 C. S. C. Rep. 562.

29. *Cushing* v. *Dupuy*, L. R. 5 A. C. 415; *Tennant* v. *Union Bank*, [1894] A. C. 45; *Attorney General of Ontario* v. *Attorney General for the Dominion*, [1894] A. C. 200, 201.

30. At pp. 30 et seq.

31. At p. 31.

and the Berne Convention is found to increase the causes of complaint which previously existed.

. . . . . .

"By the legislation of last session it is proposed that the persons having copyright under Imperial legislation or under any treaty arrangement with Great Britain, may preserve the exclusive right as to Canada by publishing or republishing in this country within a certain time, and that if he does not so publish or republish his copyright shall still avail him, to the extent of enabling him to collect a royalty on all republications made in Canada by any other person.

. . . . . .

"The Act in question is understood not to conflict in any way with Imperial legislation passed since the adoption of the British North America Act, 1867. For that reason, as has been already intimated, no proclamation will be issued bringing the Act into force until after the Imperial Copyright Act of 1886, giving effect to the Berne Convention, ceases to be applicable to Canada. The remaining question, therefore, simply is as to the right of the Parliament of Canada, under the British North America Act, to make regulations in Canada regarding copyright in Canada, notwithstanding that these regulations may differ from those existing under imperial legislation adopted prior to the British North America Act.

"The view which the undersigned respectfuly presents is that as regards all those subjects in respect of which powers were given to the Canadian Parliament by the British North America Act, the true construction of the British North America Act is that Parliament may properly legislate without any limitation of its competency excepting the limitation which Her Majesty can always impose by disallowance (whether the act be within the power of Parliament or not), and excepting also as to control by imperial legislation subsequent to the British North America Act and applicable to Canada. As to this latter it may be considered, in so far as it deals with the subjects given to the Parliament of Canada, as amendatory of the British North American Act."

Referring to the despatch of Lord Carnarvon to the Earl of Dufferin, dated 15th June, 1874, stating that he had been unable to advise Her Majesty to assent to the Canadian Copyright Act of 1872, and that he had taken the advice of the law officers of the Crown on the subject, Sir John proceeds to remark:

"Lord Carnarvon in that despatch intimates that the 91st section of the British North America Act, above referred to, is to be interpreted by one of the headings which appear in the statute, namely, 'Distribution of Legislative Powers,' and he almost seems to incline to the opinion that the 91st section on which all the powers of the Parliament of Canada depend, is intended to withdraw the powers from the provincial legislatures, and not to confer any substantial authority on the Parliament of Canada.

"If that view were correct 'The British North America Act' would simply have been a withdrawal from the legislatures of the various

provinces which were thereby united, of a large portion of the authority which they had possessed ever since representative institutions were conferred upon them, and it is difficult to see that any authority is conferred upon the Parliament of Canada, or that the Parliament has now the powers which belong to the parliaments of all other self-governing colonies. Lord Carnarvon, however, after making in effect, the statement that the 91st section of the 'British North America Act' is merely a part of a scheme for the distribution of legislative powers, and is not to be considered, as it always has been regarded and interpreted by the courts as well as by Her Majesty's Government, as the gift of legislative power to Canada, proceeds to say, that the effect of the Imperial Act (British North America Act) is 'to enable the Parliament of Canada to deal with colonial copyright within the Dominion,' and that it is clear that it was not contemplated to interfere with the rights secured to authors by the Act of 5 and 6 Vic., or to override the provisions of the Act. It may be said, in referring to this observation, that neither the Act of 1872, nor the Act of last session, did anything more than deal with colonial copyrights. If the 91st section of the British North America Act has not conferred on the Parliament of Canada all the powers of the Parliament of the United Kingdom in respect to the subjects there enumerated, the gift of powers made by that Act is delusive, in respect to the Canadian Parliament, and is less than the gift of powers which the provincial legislatures previously enjoyed regarding the same subjects. It has never been claimed that the powers of the Parliament of Canada are exclusive of the powers of the Parliament of Great Britain, and nobody can doubt that the Parliament of Great Britain can at any time (limitations of good faith and national honour not being considered) repeal or amend the British North America Act, or exercise in relation to Canada, its legislative power over the subjects therein mentioned. Subject to the same limitations, Her Majesty's Government can, of course, disallow any act of the Parliament of Canada. It is respectfully submitted that the Canadian Parliament, except as to the control which may be exercised by the Imperial Parliament, by a statute subsequent to the British North America Act, and except as to the power of disallowance, possesses unlimited power over all the subjects mentioned in the 91st section, and that it is necessary that it should do so for the well-being of Canada and for the enjoyment of self-government by its people."

He then proceeds to fortify this position by citing the cases of *Hodge* v. *The Queen,* supra, in which is was decided in effect that the legislature of the province of Ontario is, within the limits prescribed by section 92, possessed of "authority as plenary and ample as the imperial Parliament in the plenitude of its power possessed and could bestow"; *Harris* v. *Davies,*[32] in which the Judicial Committee of the Privy Council decided in 1885 that the legislature of New South Wales, under a charter not wider than the British

32. 10 A. C. 270.

North America Act, had power to repeal a statute of James I[33] and had impliedly done so,[34] which placed an action for words spoken upon the same footing as regards costs and other matters as an action for written slander; *Powell* v. *Appollo Candle Company, Limited,*[35] in which the Judicial Committee decided in the same year that a colonial legislature within the area of its powers is unrestricted; *Reg.* v. *Burah,*[36] an appeal from a judgment of a full bench of the High ourt of Calcutta, in which the question was whether a section of an Indian Act conferring upon the Lieutenant Governor of Bengal the power to determine whether the Act, or any part of it, should be applied to a certain district, was or was not ultra vires; the Lord Chancellor in delivering the judgment of the Judicial Committee said, inter alia:

"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself."

The case of *Riel* v. *The Queen,*[37] is also referred to by Sir John as being likewise pertinent, and in explaining it, he says:

"There had been three imperial statutes for the regulation of the trial of offenses in Rupert's Land, since known as the North West Territories of Canada. The statutes of Canada made other provisions inconsistent with these statutes, and the conviction of the prisoner had taken place under the statutes of Canada. The Lords of the Judicial Committee declined to admit an appeal, entertaining no doubt as to the correctness of the conviction."

Sir John then concludes his report as follows:

"The opinion of Lord Carnarvon seems to have been based on a strict view taken of the imperial statute known as 'The Validity of Colonial Laws Act' (28 and 29 Vic., cap. 63), which declared that colonial statutes should be void and inoperative if they should be repugnant to the provisions of any Act of Parliament extending to the colonies, or repugnant to the provisions of any order or regulation made under the authority of such Act, and having in such colony the force and effect of such Act. There may be grounds for argument that, as the British North America Act was passed subsequently to the statute, it confers a constitution more liberal than those to which the

33. 31 James, c. 16, s. 6.
34. By 2 Vic. c. 13, s. 1 of that colony.
35. 10 A. C. 282.
36. 3 A. C. 889.
37. 10 A. C. 675.

statute applied. Another view which may be urged is that the repugnancy, in order to have the effect indicated, must exist in relation to some statute passed after the creation of the legislature of a colony. The statute does not seem, certainly, to have been construed by the judicial committee in the matter indicated by Lord Carnarvon.

"If the view which his Lordship takes is correct it will be impossible for the Parliament of Canada to make laws in regard to any of the twenty-one subjects which constitute the 'area' of the Canadian Parliament (to adopt the phrase used in the decision of *Hodge* v. *The Queen,* in relation to the Ontario Legislature), when such legislation was repugnant to any legislation which existed previously, applicable to these subjects in the colonies. There undoubtedly did exist imperial legislation as regards all those subjects in the colonies, at a time long anterior to the gift of representative institutions, and it was never supposed to be necessary that Canada, or the provinces now constituting Canada before the Union, should obtain the repeal of that legislation by the Imperial Parliament before they proceeded to adopt such measures as became necessary from time to time in the government of the country. It is respectfully submitted that in respect to all these subjects the Parliament of Canada must be considered to have the plenary power of the Imperial Government (to quote the words of the Judicial Committee), subject only to such control as the Imperial Government may exercise from time to time, and subject also to Her Majesty's right of disallowance, which the British North America Act reserves to her, and which no one doubts will always be exercised with full regard to constitutional principles and in the best interests of the Empire, when exercised at all."

IV

Sir John's view has not been accepted as the law by the law officers of the Crown in England, as stated in the valuable works of Lefroy and Clement dealing respectively with "Canada's Federal System" and "The Canadian Constitution" (1916). The Canadian cases cited as being opposed to it are *Bedford et al. v. Smiles,*[38] confirming on appeal the judgment of Mr. Justice Proudfoot on that case[39]; *Regina* v. *Brierly*[40]; *The Farewell,*[41] in which it was held that when an act of the Dominion Parliament is in part repugnant to an imperial statute effect will be given to its enactments in so far as they agree with those of the imperial act: *Morang* v. *Publisher's Syndicate*[42]; *Black* v. *The Imperial Book Co., et al.,*[43] on appeal from the judgment in that case of Mr. Justice Street.[44]

38. (1887) 1 Ont. Rep. 436.
39. 23 Grant's Ch. 590.
40. (1887) 14 Ont. Rep. at p. 531 et seq.
41. (1881) 7 Ont. L. R. 380.
42. (1900) 32 Ont. Rep. 393.
43. (1904) 8 Ont. L. R. 9.
44. 5 Ont. L. R. 184.

None of these cases appears to have settled the specific question raised by Sir John as to the effect of section 91 of the British North America Act on English enactments passed before that Act, as appears to be admitted by Keith in his "Responsible Government in the Dominions" (1912), when he says:[45] "The subject of copyright in Canada, although it has elicited certain legal decisions, has not, unfortunately, produced a final decision on the point discussed above"—the point raised by Sir John Thompson.

This admission made in a standard authority derives additional force from the fact that it is made by one who essays, although rather unsuccessfully I may say with deference, to controvert Sir John's arguments. The cases if conclusive would furnish a strong current of authority adverse to those arguments, but as they deal only with the *general* question of the effect of repugnancy between colonial and English legislation they can hardly be regarded as decisive of the constitutional question as to which they are cited.

Only two of those cases were decided after the publication of Sir John's Report on Copyright, and the references in them to the position advanced by him assume that his interpretation of the cases cited by him was that the Parliament of Canada could repeal acts passed by the imperial Parliament applying to the colonies. Mr. Keith also puts that interpretation in Sir John's mouth.[46] This statement is more ingenious than accurate, as will appear from a careful reading of Sir John's report. What he did mean was that the Parliament of Canada had received a gift of powers from the imperial Parliament having the effect of making Dominion legislation passed within the ambit of any of those powers supreme, and that to such legislation the imperial acts passed before the enactment of the British North America Act must, therefore, yield in so far as repugnant to it. Voluntary renunciation by the Parliament of Great Britain to that extent is not the same as the right of the Parliament of Canada to repeal imperial enactments applicable to the colonies.

The Supreme Court of Canada, when the case of the *Imperial Book Company* v. *Black*[47] came before it on appeal, although confirming the decision of the court below on a ground which did not involve the question raised by Sir John, reserved the question whether "the Parliament of Canada, having been given exclusive jurisdiction to legislate upon the subject of copyright, may not, by

45. Vol. I, at p. 420.
46. Vol. I, at p. 416.
47. 35 S. C. R. 488.

virtue of that jurisdiction, be able to override imperial legislation antecedent to the British North America Act."

Two English cases are also cited by those opposed to Sir John's view, viz., *Routledge* v. *Low*,[48] and *Re the Queen* v. *Marais*.[49] The first of these had reference to a question governed by the law of a province as that law was before the passing of the British North America Act, and the other, like the Canadian cases above cited, had to do, and only as to one point raised, with the general effect of the "Colonial Laws Validity Act" on the laws of a colony to which a local legislature had been granted. In the brief work by the Canadian Deputy Minister of Justice, Mr. Newcombe—"British North America Acts,"—in which, in the midst of his multifarious duties, he throws a very useful searchlight on cases decided by the Judicial Committee of the Privy Council up to 1907, he refrains from expressing any opinion on the question here considered further than to say, after stating that the copyright statute of 1889, c. 29, has not been proclaimed, notwithstanding much correspondence and discussion between the Canadian and imperial governments as to the enacting authority of the Parliament of Canada, or the propriety of assenting to the proclamation of the Act, that the government of Canada had refrained from submitting any issue arising in this correspondence for the determination of the Judicial Committee. He had succeeded Sir John Thompson as Canadian delegate to London in connection with the copyright question.

The concern evinced by the discussion of the copyright question has subsided since 1911, although, of course, the main question still remains as to the right of the Parliament of Canada under the powers granted to Canada by the British North America Act to enact laws supreme and unrestrained by any law passed by the Parliament of Great Britain before that Act was passed. The British Copyright Act, 1911, c. 46, repeals the Imperial Act of 1842, and leaves it to the option of the legislature of any self-governing Dominion to adopt said c. 46, either with or without any modification or additions relating exclusively to procedure and remedies, "or necessary to adapt it to the circumstances of the Dominion as may be enacted by such legislature."

It also provides that such legislation of any self-governing Dominion may repeal either in whole or in part any imperial act relating to copyright so far as it is operative within any self-governing Dominion, saving rights existing at the time of such repeal.

48. L. R., 3 H. L. 100.
49. [1902] A. C. 51 (54).

Any British possession to which the Imperial Act of 1911 extends may modify or add to any of its provisions applicative to it, but such amendments, except so far as they relate to procedure and remedies, shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession and to works "first published" in the possession.

V

There is no legal limit to the power of the Parliament of the United Kingdom to make and unmake laws. An existing Parliament cannot, however, bind a succeeding Parliament.[50] The following is apposite in this connection:

> "The power of legislation vested in Parliament is unlimited, apart from the restrictions imposed by its own sense of fitness and the sense of fitness of the electorate, to whose wishes the Commons, and Parliament itself, are bound eventually to submit. There is thus no law which Parliament cannot make or unmake, whether relating to the constitution itself or otherwise; there is no necessity, as in states whose constitutions are drawn up in a fixed and rigid form and contained in written documents, for the existence of a judicial body to determine whether any particular legislative act is within the constitutional powers of Parliament or not; and laws affecting the constitution itself may be enacted with the same ease, and subject to the same procedure, as ordinary law."[51]

The Parliament of Canada under the Canadian constitution, which is "similar in principle to that of the United Kingdom," according to the preamble of the British North America Act, is also supreme within the ambit of the powers conferred upon it by that Act, and as stated by Clement,[52] courts of law have no right to inquire whether the jurisdiction conferred on the federal legislature has been exercised wisely or unwisely. As further astutely observed by that author, Magna Charta may be interfered with, taxation imposed without regard to uniformity or equality[53]; class legislation and laws discriminating against race may be enacted[54]; one man's property may be taken from him and given to another without compensation[55]; ex post facto legislation passed; in short,

50. *Halsbury*, "Laws of England," Vol. XXI, p. 617.
51. *Halsbury*, "Laws, etc.," Vol. VI, pp. 317, 318.
52. 3d ed., (1916) p. 358.
53. *Fortier* v. *Lambe*, 255 C. R. 422.
54. *Tomey Homma's Case*, [1903] A. C. 151.
55. *McGregor* v. *Esquimalt & N. Ry.*, [1907] A. C. 462; *Florence Mining Co.* v. *Cobalt etc. Co.*, (1911) 18 Ont. L. R. 375; *Re Goodhue*, 19 Grant 366.

the power may be abused; but as was observed by their Lordships of the Judicial Committee in delivering judgment in *Attorney General for the Dominion of Canada* v. *Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia* (Fisheries case):[57]

"The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."

As to the power of the Canadian judiciary to determine the validity of Canadian legislation, it is by no means regarded as a disadvantage by the Canadian elector as it is not only a corrective check upon legislation passed by the provinces trenching upon Dominion rights, and vice versa upon laws passed by the Dominion affecting unconstitutionally the rights of the provinces, but also tends towards greater care being exercised generally by the lawmakers entrusted by the electors with the duty of framing laws for the welfare of the people. Doubtless, but for the corrective power possessed by the Supreme Court of the United States as well as by our Canadian Courts, many unconstitutional laws, not to say freak laws, would have found a permanent place upon the statutes in both countries, just as bad laws have found a fixed place upon the English statutes in the past, largely because of the unlimited legislative power of the British Parliament unrestrained only by the moral sense of the nation as expressed through its elected representatives. Fortunately all bad and worn-out laws of any state are apt to effect their own cure as they bid to be swept away by the popular voice, or to become obsolete, by the nation's will expressed through its legislature. When the hastening process that sends such laws to the scrap-heap has fully accomplished its purpose, then indeed the people freed from their thraldom shall enjoy the fullest freedom compatible with their political constitutions. In England that process has long and effectively been at work, in order to give all creeds and classes the enjoyment of the fullest liberties broad-based upon the people's will.

The fact that the Parliament of Canada cannot change its constitution without the intervention of "the mother of parliaments" is not necessarily to its disadvantage. The great sense of British freedom and fair play, evidenced by Great Britain's relations with her British colonies in the past, can be trusted to heed the desire of the Parliament of Canada in response to the people's wishes for

57. [1898] A. C. at p. 713.

any amendment of the Canadian constitution. And where the constitution of a state has made a division of legislative powers between different provinces or political sub-divisions composing it, departing in that respect from the British Constitution framed at an early time for the needs of a comparatively small and compact island, it is not desirable or expedient that the power to legislate for all the different divisions composing the state should be centralized in one legislature. It is instructive in this respect that one of the strongest arguments for granting local self-governments to Ireland, Scotland, and Wales is that it has become necessary to relieve England of the congestion of legislation as to matters which could be transferred to the legislative powers of such local self-governments, effecting in that way a greater similarity between the British and Canadian constitutions.

Prominence is usually given to numerous cases on the British North America Act other than those cited above. Among them may be here first cited *Holman* v. *Green*,[58] in which it was held that the grant of part of the foreshore of a natural harbor, used as such by the public, made by the Government of Prince Edward Island after the admission of that province into the Canadian Union of the provinces, was invalid, because sec. 108[59] of the British North America Act declared public harbors to be the property of the Dominion, and this decision was reaffirmed in the appeal to the Privy Council in *Attorney General of Canada* v. *Attorneys General of the Provinces of Ontario, Quebec, and Nova Scotia*.[60]

In *Attorney General* v. *Mercer*,[61] it was held that escheated lands situate in the province of Ontario belonged to the Crown in right of that province, and not in right of the Dominion, as by section 109 of the British North America Act:

> "All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

In Attorney General of Canada v. *Attorney General for the Provinces* (the Fisheries case),[62] the question was as to the right

58. 6 Can. Sup. Ct. Rep. 707.
59. 39 Schedule to the Act.
60. [1898] A. C. 700.
61. 8 A. C. 867.
62. [1898] A. C. 700.

acquired by the Dominion under sec. 91 (12) relating to "seacoast and inland fisheries," and it was held that the right was not that of a proprietary interest therein, but a right of regulating legislation, the ownership of such fisheries having remained in the provinces as before the union. The right given to the Dominion Parliament is limited to the enactment of fishery regulations and restrictions, and does not extend to the taking of fish in navigable or non-navigable lakes, rivers, streams, and waters, the beds of which had been granted before the union, or not having been so granted are assigned to the provinces under the British North America Act.

In *Attorney General of British Columbia* v. *Attorney General of Canada* (Precious Metals Case),[63] the question was as to whether the transfer of lands, which British Columbia had by article 11 of her terms of union with the Dominion agreed to make, carried with it the precious metals and it was held that it did not. The precious metals—gold and silver—as distinguished from the baser metals, are not regarded as partes soli, or as incidents of the land in which they are found, but belong to the Crown, and under sec. 109 of the British North America Act beneficially to the province. An intention to transfer them must be expressed or necessarily implied.

In *Attorney General for Canada* v. *Attorney General for Ontario*,[64] it was held that by the combined effect of sec. 92 (1, 4 and 14) it is competent to the province to appoint Queen's Counsel by virtue of a provincial statute.

The criminal law in its widest sense is reserved by s. 91 (27) of the British North America Act for the exclusive authority of the Dominion Parliament. It is in force in the province of Quebec to the same extent as in the English provinces, although the law there as to property and civil rights follows the Code Napoléon so far as adopted in that province as the Quebec Civil Code.

It was held in the case of the *Attorney General for Ontario* v. *Hamilton Street Railway*,[65] that c. 246 of the Revised Statutes of Ontario, 1897, an act to prevent the profanation of the Lord's Day, was ultra vires as any infraction of it would be an offense against the Criminal Code. The criminal law in force in any province at the union is still in force there except in so far as affected by amending Dominion legislation. The provinces are also given by the British North America Act, 1867, criminal jurisdiction for enforcing any law of the province made in relation to any matter

63. [1889] 14 A. C. 295.
64. [1898] A. C. 243.
65. [1903] A. C. 524.

coming within any of the classes of subjects enumerated in sec. 92.

The plenary powers of legislation possessed by the Dominion Parliament in reference to immigration were affirmed in the case of *Attorney General of Canada* v. *Cain*.[66] In that case it was held that under the power to make laws for the peace, order, and good government of a colony, a colonial legislature may pass a law preventing an alien from entering the colony, and that a colonial legislature may legislate as amply as the British Parliament for the expulsion of aliens unlawfully entering it, and that such exterritorial constraint as may be necessary to accomplish such expulsion may be used.

In *Attorney General of Manitoba* v. *Manitoba License Holders' Association*,[67] following *Attorney General for Ontario* v. *Attorney General for the Dominion*,[68] it was held that the Manitoba Liquor Act, 1900, was within the competency of that province to pass, its subject being and having been dealt with as a matter of a merely local nature in the province within the meaning of sec. 92 (16) of the British North America Act, notwithstanding that it might have interfered with Dominion revenue, and have, indirectly at least, affected business done beyond the province.

"Local works and undertakings other than such as:

(a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(b) Lines of steamships between the province and any British or foreign country;

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces,"

are by sec. 92 (10) exclusively assigned to the provinces. Many cases have been decided under this allocation of powers, but the only one possessing a somewhat novel element of interest is the more recent case of *Hamilton, Grimsby and Beamsville Railway* v. *Attorney General for Ontario*,[69] in which it was held that a declaration made by the Parliament of Canada, under said sec. 92 (10) of the British North America Act that a provincial work or undertaking is for the general advantage of Canada, whereby under sec. 91 (29) of that Act the work or undertaking becomes subject to

66. [1906] A. C. 542.
67. [1902] A. C. 73.
68. [1896] A. C. 348.
69. [1916] A. C. 583.

the exclusive authority of the Dominion, *can be repealed or varied* by a subsequent act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared.

As to the effect of sec. 92 (10) see the Traffic case, *City of Montreal* v. *Montreal Street Railway.*[70] Probably the most important Canadian cases which in recent years have reached the Privy Council involving contentious questions between the provinces and the Dominion are the "company cases"—*John Deere Plow Company, Limited,* v. *Wharton*[71]; *Bonanza Creek Gold Mining Co.* v. *The King*[72]; *Attorney General for Canada* v. *Attorney General for Alberta*[73]; *Attorney General for Ontario* v. *Attorney General for Canada.*[74]

The *John Deere Plow Company* v. *Wharton,*[75] came before the Privy Council Board as consolidated appeals by special leave from two judgments of the Supreme Court of British Columbia, and the question was whether Part VI of the Companies Act of British Columbia was ultra vires as not being legislation within the authority of the province to enact under the British North America Act, 1867. Part VI of the provincial act required inter alia that every company incorporated otherwise than under the law of the province should be licensed under the provincial law, in order to be capable of carrying on business in the province, or of enforcing by action in the provincial courts any contract made within the province. It was held by the Judicial Committee that said Part VI, which in effect assumed to regulate Dominion companies, empowered to trade by Dominion legislation, was ultra vires, as the Dominion Parliament having exclusive authority to regulate trade and commerce, sec. 91 (2), of the British North America Act; the status and power of such companies cannot be regulated by provincial legislation.

In *Bonanza Creek Gold Mining Company* v. *Rex,*[76] the minor question raised was whether a company incorporated under the Ontario Companies Act[77] is "incorporated under a Canadian charter" within the meaning of regulations governing the issue of a free miner's certificate in the Yukon Territory. The question was an-

70. [1912] A. C. 383.
71. [1915] A. C. 330.
72. [1916] A. C. 566.
73. [1916] A. C. 588.
74. [1916] A. C. 598.
75. [1915] A. C. 330.
76. [1916] A. C. 566.
77. Ont. R. S. C. 191, s. 9.

swered by the Judicial Committee in the affirmative. The other larger question was, had a provincial company incorporated by letters patent issued by the Lieutenant Governor of Ontario under the Ontario Companies Act, with the object of carrying on the business of mining, capacity to accept and exercise powers and rights outside that province, such as mining leases and rights in the Yukon Territory, conferred by the authorities of the Dominion and Yukon Territory, and it was also answered in the affirmative, it appears mainly on the ground disclosed in the following extract from the judgment discussing the effect of sec. 92 (11) of the British North America Act:

"The words, 'legislation in relation to the incorporation of companies with provincial objects,' do not preclude the province from keeping alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of a statute, a corporation with this general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted ab extra. It is, in their Lordship's opinion, in this narrower sense alone, that the restriction to provincial objects is to be interpreted. It follows that, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, appellant company could accept powers and rights conferred on it by outside authorities."

A fuller reference to this case which involves several subtleties would cover much space.

In *Attorney General of Canada* v. *Attorney General of Alberta*,[78] the question was as to the legislative authority of the Dominion Parliament to restrict by a licensing system the trade or business of insurance, and it was held that such legislation[79] was ultra vires of the Parliament of Canada as the authority conferred by sec. 91 (2) of the British North America Act, 1867, to legislate as to "the regulation of trade and commerce" does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, and because it could not be enacted under the general power conferred by

78. [1916] A. C. 588.
79. Insurance Act, 1910, c. 32, ss. 4, 70.

sec. 91 (1) to legislate for the peace, order, and good government of Canada as it trenched upon the legislative authority conferred on the provinces by sec. 92 (13) to make laws as to civil rights in the province. It was further held in this case that it would be competent for the Parliament of Canada, under sec. 91 (2-25) by properly framed legislation to prohibit an insurance company incorporated by a foreign state from carrying on business in Canada, if the company did not hold a license from the proper authority, even if the business carried on was confined to a single province. And it is held that a license under that act is a prerequisite in the event of such a company undertaking such business.[80] No more need here be said about the other case, *Attorney General for Ontario* v. *Attorney General for Canada,*[81] than that the questions referred to the Supreme Court of Canada[82] which were in turn submitted to the Privy Council, were answered by reference to the other three company cases just referred to.

It seems appropriate here to cite the case of *Attorney General of Ontario* v. *Attorney General for Canada*[83] in which it was decided that legislation authorizing the putting of questions to the courts is intra vires both of the Dominion and provincial legislatures.

Section 4 of c. 10 R. S. C., 1906 establishes the privileges and immunities of members and officers of the Senate and House of Commons of Canada, as being:

"(a) Such and the like privileges, immunities, and powers as at the time of the passing of the British North America Act, 1867, were held, enjoyed and exercised by the Commons, House of Parliament of the United Kingdom, and by the members thereof so far as the same are consistent with and not repugnant to the said Act; and

"(b) Such privileges, immunities, and powers as are from time to time defined by the Act of Parliament of Canada, not exceeding those at the time of the passing of such act held, enjoyed and exercised by the Commons, House of Parliament of the United Kingdom and by the members thereof respectively."

In the case of *Fielding* v. *Thomas,* the Nova Scotia provincial legislation,[84] which creates the jurisdiction of the Provincial House and indemnifies its members against legal proceedings in respect of their votes therein, is a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Such

80. *Guardian Assurance Co.* v. *Garrett,* Western W. Rep., (1918) Vol. 2, p. 405.
81. [1916] A. C. 598.
82. 48 C. S. R. 331.
83. [1912] A. C. 571.
84. C. 3, 5th Series, R. S. of N. Scotia.

legislation is intra vires under sec. 92 of the British North America Act, or sec. 5 of the Colonial Laws Validity Act, c. 63, 1865.

VI

Section 129 of the British North America Act, 1867, provides for the continuance of laws, courts, officers, etc., in force and existing in Canada (Ontario and Quebec), Nova Scotia, or New Brunswick at the time of the union. It reads:

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, and New Brunswick at the Union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the Union shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick, respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective province, according to the authority of the Parliament or of that legislature under this Act."

The powers conferred by this section to repeal and alter the statutes of the old Parliament of Canada are co-extensive with the powers of direct legislation with which its bodies are invested by other clauses of the Act.[85]

The said section 129 is applicable to other colonies or provinces of British North America admitted into the union under sec. 146 of the British North America Act, 1867.

The claim of any province or portion of British North America admitted into the Union, that any law which seemingly trenches on the exclusive powers of the Parliament of Canada, is in force in it by reason of its existence at its entrance into the union, should, it is obvious, be established beyond doubt before the Parliament of Canada admits it.

In a recent case, *Walker* v. *Walker*,[86] it is decided that the Act 20 and 21 Vict. (1857), c. 85, was introduced into Manitoba by the Dominion Act, c. 33, 1888, s. 1 (now sec. 6, c. 99, R. S. C., 1906). The part here material of said section 1, reads:

"Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in

85. *Dobie* v. *Temporalities Board*, 7 A. C. 136.
86. (1918) Western W. Rep., Vol. 2, p. 1.

force in the province of Manitoba, in so far as the same are applicable to the said province, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any act of the Parliament of the United Kingdom applicable to the said province, or of the Parliament of Canada."

The effect of this section, it is claimed by the decision in this case, is to introduce into Manitoba the Divorce and Matrimonial Causes Act.[87]

Sec. 2 of the Dominion Act, c. 3, 1870, establishing and providing for the government of the Province of Manitoba, provides as follows:

2. "On, from, and after the said day on which the Order of the Queen in Council shall take effect as aforesaid, the provisions of the British North America Act, 1867, shall, except those parts thereof which are in terms made, or by reasonable intendment, may be held to be specially applicable to, or only to affect one or more, but not the whole of the provinces now composing the Dominion, and except so far as the same may be varied by this Act, be applicable to the province of Manitoba, in the same way, and to the like extent as they apply to the several provinces of Canada, and as if the province of Manitoba had been one of the provinces originally united by the said Act."

Nothing in this section gives the Canadian Parliament power to vary the provisions of the British North America Act, 1867, in reference to the province of Manitoba. Marriage and divorce is one of the subjects assigned exclusively to the Dominion Parliament by sec. 91 (26) of the British North America Act, 1867.

Until a decision is given in the highest Court of Appeal for Canada—the Privy Council—in the case of *Walker* v. *Walker*, supra, it would be only inviting discussion more or less useless, to express any opinion as to the correctness of the judgment delivered therein by the Manitoba court. It may in passing be observed, however, with deference, that the decision seems to imply the right of the Dominion Parliament to indirectly change the terms of the British North America Act respecting the distribution of powers between a province and the Dominion, even after it appears that those terms are expressly made applicable to such province in the act under which it is admitted into the union. Such power would give the Dominion Parliament authority to amend indirectly the British North America Act, although it cannot do so directly, and might result in making some one province an imperium in imperio by giving it powers of legislation concurrent with the legislative powers of the Dominion. Until a final decision is given as to the

87. 20, 21 Vict. (1857) c. 85.

question raised by this case, it will be considered doubtful that the Dominion Act, c. 33, 1888, has the effect claimed for it.

On this the anniversary of the day when the British North America Act, 1867, came into operation,[88] the occasion seems auspicious for reviewing, as I have endeavored to do in these notes, some of the principles underlying the structure raised by the eminent men, now all departed, who had so distinguished a part in its formation. Truly has it been said that they builded better than they knew. The truly patriotic Canadian cherishing the memory of the "fathers of Confederation" will honor that memory not only by eternal vigilance in respect to preserving the autonomy of the Dominion, but in practicing the personal virtues which ensure the happiness of a nation. After the close of the great cataclysm into which the world has been plunged by those who care neither for laws, treaties, or constitutions, the stage will be set for greater things. The Canadians who have made the supreme sacrifice on the battlefields of Europe, and gained for Canada such enviable reputation, will have died in vain if the Canadian people should ever fail through their own faults to share in their fullest measure in the blessings of liberty and peace guaranteed by their constitution binding them to the motherland, as declared by Edmund Burke, by ties which though as light as air are strong as links of iron. While dissension and petty quarreling, arising from whatever cause, creedal, or racial, or political, continue to divide the people of any country either in time of war, or in time of peace, their progress and happiness must necessarily be impeded. In this connection the words of Robert Burns quoted by Lloyd George, speaking in Edinburgh on May 24th last, while protesting against the harassing of men in charge of the destiny of a nation, may again be repeated.

"O, let us not, like snarling curs,
In wrangling be divided,
Till slap! come in an unco loun
And wi' a rung decide it."

88. July 1.

C—ADMINISTRATIVE LAW

COMPENSATION FOR LOSSES OF WAR

By Léon Duguit[1]

Among the great number of legal problems arising from the Great War, there is none more serious for the countries in whose territory military operations were carried on than that of compensation for injuries to persons and things caused by these operations. The question may be put in the following terms: Is the state under a legal obligation to indemnify its citizens for material losses which are the direct result of military operations, whether these operations are those of the nation's own army or of the army of the enemy? This is precisely what the problem is.

The question here is not that of knowing whether a belligerent state is under an obligation to indemnify the citizens of the other

1. [Among eminent living French jurists, the author is one of the most widely known to readers in this country. His first American introduction was by means of a translation of important selections from his notable book "L'État: le droit objectif et la loi positive" (Paris, 1901), as one of the divisions of the volume entitled "Modern French Legal Philosophy," The Modern Legal Philosophy Series, VII, pp. 237-344, Boston, 1916. A note on Prof. Duguit by Arthur W. Spencer will be found in the translated volume at pp. xliv et seq. Prof. Duguit's "Les transformations général du droit privé depuis le Code Napoléon" (1912, Félix Alcan)—a course of lectures delivered by the author at Buenos Aires in 1911—appears in translation as chapter iii of "Progress of Continental Law in the Nineteenth Century," The Continental Legal History Series, XI, Boston, 1918. The November, 1917, Harvard Law Review was a special number which contained a monograph of the author, translated into English by Frederick J. de Sloovère under the title "The Law and the State" (Har. L. Rev., XXI, 1-185). A scholarly note by Prof. Harold J. Laski is found in the same issue (pp. 188-9). In April, 1918, the author contributed an interesting article in the field of jurisprudence to the Yale Law Journal (XXVII, 753 et seq.) under the title "Collective Acts as Distinguished from Contracts."

The author was born at Libourne (Gironde), France, Feb. 4, 1859; became agrégé professor of the faculty of law at Caen Jan. 1, 1883; and was appointed professor of constitutional law at the University of Bordeaux April 1, 1892, which appointment he still holds. In 1911 he was called by the faculty of law at Buenos Aires to deliver a series of lectures. He is one of the greatest living authorities in public law. Following are some of his principal works: La séparation des pouvoirs et l'Assemblée Constituante de 1789 (Paris, 1894); L'État: le droit objectif et la loi positive, 620 pp. (Paris, 1901); L'État, les gouvernants et les agents, 774 pp. (Paris, 1903); Traité de droit constitutionnel, 2 volumes, 570 and 558 pp. (Paris, 1911); Manuel de droit constitutionnel, 3d ed. (Paris, 1917); Les transformations générales du droit privé depuis le Code Napoléon (Paris, 1912); Les transformations du droit public (Paris, 1913); (in collaboration with M. Monnier, Dean of the Faculty of Law of Bordeaux) Les Constitutions de la France précédées de Notices historiques, 3d ed. (Paris, 1914).

This translation (from the French) is by Cornelia Wyse of the Chicago bar.—Ed.

state for damages. That is a question of international law which can not be answered at present, as may be readily understood. On the other hand, the form of the question shows that we are only concerned with material losses resulting directly from military operations and not at all with losses which are indirectly due to the war. As for the latter losses, there is no question of compensation, because it is impossible to estimate their extent and they are so universal that it is impossible to make amends for them. Finally, the question goes only to losses suffered by citizens in other than a military capacity. That the state owes an indemnity to all soldiers who are wounded or who have contracted disease while in military service, and to the families of those who have given their lives for their country, is not to be questioned.

The question which we are studying includes all material losses resulting directly from military operations, injuries to both persons and property, to non-combatants; for example, for wounds which civilians receive from bombardments by aviators or from long-range guns. The question includes damages to property of all kinds—capital or things to be consumed, movable or immovable property. It also includes losses resulting from contributions, fines, or requisitions exacted by the enemy. It makes no difference who the person is who has suffered a loss, whether it is an individual or a group, a private person or a public person.

The question presents itself in the same terms with reference to losses caused by acts of the enemy as with reference to those caused by acts of the nation's own army. As to the former, it is a question of knowing whether the state in whose territory the damage is done can exact an indemnity for it from the enemy state when peace is made. But this is a question of international law which I do not wish to discuss and its solution is entirely independent of the question of internal law which alone I wish to examine.

Finally, we should call attention to the fact that we are not trying to distinguish between lawful and unlawful acts of warfare. That, too, is a question of international law which arises only in the relations of belligerent states to each other. On the other hand, the boundary between lawful and unlawful acts of war is so uncertain (for is not every act of war unlawful by nature?), in spite of the efforts of The Hague Conference, that I shall take care not to touch upon the question.

I

The Laws of the French Revolution

Grotius foresaw the question and solved it. He expressed an idea, often referred to since, in terms which are worth the trouble of reproducing—

> "Vasquez does not want the state to be required to indemnify its subjects for what they have suffered through hostile acts during war, because, he says, 'the law of warfare permits such injuries.' But I do not like this idea, . . . for the law of warfare of which he speaks . . . takes enemies into consideration, in their relation to each other, but it does not include members of the same state, whose association demands that, because of their life in common, they bear in common the losses which are suffered by different individuals."

Such, to Grotius, is the solution which is in accordance with justice. But the author adds, however, that for special reasons the state, by an express civil law, can decide that no one shall have a right of action against it for compensation for losses during war. In the first place, this is "in order to make each one more zealous in defending what belongs to him against the enemy," and in the second place, it is "because of the difficulty of estimating the loss and because of the poverty of the national treasury compared to the great fortunes of certain classes of citizens."[2]

The question was put to the Legislative Assembly on the eleventh of August, 1792, at the time of the Prussian invasion, on the eve of Valmy (September 21, 1792). In the decision which the Assembly made, the influence of Grotius is evident. In the preamble to the law which it passed the Assembly expressly stated that justice placed the obligation upon society to pay compensation for losses suffered by individuals on account of war. But the latter part of the preamble and the act itself no longer speak only of aid, the extent of which shall depend upon the condition of the national treasury and the personal situation of citizens who have suffered losses. The nature and the amount of aid of every kind are to be fixed by the Legislative Assembly.

By a law of August 14th, 1793, the Convention reaffirmed anew the principle of compensation in a definite way. Aid granted to victims by the state is no longer spoken of; nevertheless there is no mention yet of a right to compensation. Distinctions are no longer drawn between different classes of citizens based upon their financial

2. *Grotius*, "Droit de la guerre et de la paix," livre III, chap. 20, par. 8, édition Barbeyrac, Bâle, 1768, II, p. 417.

condition, and indemnities are to be paid for losses caused by the French army as well as for those caused by the enemy. However, not the courts, but the executive council, will fix the amount of indemnity.

This law undoubtedly made progress towards the recognition of the right to compensation for losses, but, although it has been said that it recognized this right, it did no such thing. The expression of the idea of "aid" appears again in a law of the Directory (dated 19 vendémiare an VI) which is entitled "Law to determine the mode of distribution of aid and indemnities granted on account of losses caused by the war and other unforeseen accidents." Thus, the state can give aid because of losses caused by war, but it is under no legal obligation to pay compensation for these losses. There is no right against the state for compensation. Such was the dominant idea in France up to 1914.

II

French Laws and Jurisprudence from 1814 to 1914

After the wars of the First Empire, the law of April 28th, 1816,[3] decided that, "besides the ten millions on the civil list granted by the the king, all direct taxes in arrears shall be employed in relief and in aid for the departments which had suffered most during the military occupation of 1815." However, numerous actions for compensation were started against the state. The Council of State declared there was no ground for any of these actions.[4] These decisions were inspired by two ideas: first, that the state is not responsible for acts done by public authority, and no part of the public authority ever appears as conspicuously as during war; secondly, there is an element, vis major, in the losses resulting from war which excludes the responsibility of the state. Today these two reasons seem to us to be singularly open to criticism; in the middle of the nineteenth century they seemed to everybody to be conclusive.

This was the way also that they appeared to the National Assembly of 1871, which did not want to recognize a right to compensation on the part of the victims of the Franco-Prussian war. No doubt the preamble to the law of the sixth of September, 1871, said: "Considering that during the last war that portion of terri-

3. Art. 8.

4. Cf. Arrêt de principe Glairet, 26 mars 1823, "Recueil des arrêts du Conseil d'État," p. 237.

tory which was invaded by the enemy carried the burdens and suffered devastations without number, the feeling of nationality in the hearts of all the French people places upon the state the obligation of indemnifying those upon whom these exceptional losses have fallen in the common struggle." But Article 1 spoke only of an indemnity that would be granted to all those who had endured forced contributions, requisitions, fines, and material losses during the invasion. A commission was charged with the duty of determining what the losses were; and according to the terms of Article 3 of the law, "When the extent of the losses shall have been determined, a law shall fix the sum which the condition of the national treasury will permit to be devoted to the indemnification for these losses and it shall determine how this sum is to be divided." Thus, in spite of the words of the preamble, this law did not recognize a right to indemnity at all, but only made a grant.

During the years which followed the war of 1870-71 a great many actions were started against the state for compensation for losses due to the war. They were all thrown out by the Council of State, because of the two dominant ideas already indicated, that the state is not responsible when it is acting as a public authority, and that there is an element of vis major in losses caused by war which excludes the responsibility of the state. A few years before the war of 1914 the Council again rejected demands based upon losses caused by Colonial expeditions, "considering that losses suffered in the course of military operations conducted on foreign territory can not be followed by a law-suit."[5]

III

The French Law of December 26th, 1914

When Germany in the month of August, 1914, threw herself upon France with all the forces of destruction which a preparation of forty years had gathered together, when public opinion experienced the ravages which were committed in northern France, the sentiment of nationality became greatly intensified and the bond which unites all French people and all French lands seemed stronger than it had ever been before. It was under these conditions that the thought came to every mind, very clear and pressing, that

5. Conseil d'État, 3 mars 1905 (Monte et Borelli), à propos de l'expédition du Dahomey, Recueil, 1905, p. 226; 22 février 1907 (Lechartier) à propos de l'expédition de Madagascar, Recueil, 1907, p. 185.

it is not assistance or relief which the nation as a whole owes to those who have suffered material and direct losses from the war, but rather that it is an indemnity due by virtue of a legal obligation resting upon the state; that this is not an act of charity or of generosity which the nation should perform, but the fulfilling of a legal obligation, an obligation which it is the duty of a legislator to recognize and to perform.

The government, expressing the unanimous opinion of the country, said in the declaration read to the Chambers on December 22nd, 1914:

"France will rise from her ruins, proud of the distress of a part of her children, and, taking into account the revenue from the indemnities that she will exact and the aid of a tax which the whole nation will pay, she will discharge her duty of national solidarity. In repudiating a form of assistance which implies a favor, the state asserts the right of compensation for the benefit of those whose property has suffered from war."

The Chambers, wishing to give legislative sanction to the principle of a right to indemnity, inserted Article 12 in the financial act of December 26th, 1914, worded as follows:

"A special law shall determine the conditions under which the *right* to compensation for material losses resulting from acts of war shall be exercised. A decree of the Council of State shall fix the procedure as to the proof of loss and the functioning of the valuation commissions."

This decree was promulgated on the fourth of February, 1915, and certain additions and modifications have been made since. The valuation commissions were appointed and began their work immediately. But the law which was announced has not yet been promulgated up to the time of writing these lines. Different bills have been passed by the Chamber and by the Senate. Besides numerous minor details, one important difference divides the two bodies, and this is in regard to the question of replacing the property destroyed by means of the indemnity, as will be explained later.[6]

IV

The Basis of the State's Responsibility

In order to show this responsibility, they talked about national brotherhood during the Revolution, and the feeling for nationality

6. Cf. § VI.

in 1871; today they talk about national solidarity. All these expressions are synonymous. The idea which they express is correct, per se. It is unquestionably equitable that all the members of the same nation should bear the losses in common which result from a national war; and France has never fought a war that was more truly national than the present war. It is just that the injuries and burdens should be distributed as equally as possible among all. But the expressions used are too general and, therefore, somewhat vague. The idea stated in these very general and very abstract terms might logically lead to inadmissible conclusions; for example, the obligation of the nation to make good all losses which result directly or indirectly from the war; this would offer a refuge to anyone who had seen his fortune diminish on account of the war, and who might claim that others had suffered less from the events which had taken place.

On the other hand, we can no longer apply the idea which today serves as the basis of the responsibility of the state in administrative affairs and which may be stated as follows: All kinds of public service operate in the interest of all, and every time their operation directly causes a particular injury to certain persons, with or without fault on the part of the agent, the collective coffer ought to make good the injury. The responsibility of the state could thus be justified only as to the losses of war which arise from the acts of the national army. Now we can hardly reason in this way even in regard to these losses. Can military operations be compared to the functioning of civil duties and even to the functioning of military duties in times of peace? It is impossible to take away entirely the considerable amount of vis major that is in all military operations in time of war. Besides, to tell the truth, the cause of the loss is the war, and not the functioning of a public duty.

In any case, the comparison of losses from war with those caused by the performance of public duties is not possible when these losses arise from acts of the enemy army. We can not really say that poor performance of a national public duty caused the injury, because however well the duties of war are performed, it is actually impossible to prevent a certain amount of destruction on the part of the enemy. Yet we can not say that this is a case of vis major exclusively, which the state can not prevent, and that in the present war, especially, the French nation is in the presence of a blind destructive force, the most powerful that has ever existed,

and that the state no more owes a legal duty to pay compensation than for a flood, a volcanic eruption, or an earthquake. In this solution there is something which is repugnant to the legal conscience and to the feeling of justice, something contradictory to the fact of national solidarity, the consciousness of which has been so strongly expressed in our country. The legal obligation to make good losses caused by war unquestionably rests upon the state; but what is its real foundation?

It is assuredly the equality of all the members of the same nation before the exceptional burdens and losses which result from a war. The state ought to intervene in order to make this equality as real as possible. But it is not a question of arithmetical equality; it is a question of a social equality, which is quite a different thing. Just as today everyone admits that equality in taxation does not consist in levying upon every person a tax varying in mathematical proportion to the property and income of each, but consists, on the contrary, in establishing a system of progressive taxation, that is, one which lays upon great fortunes proportionately higher taxes than upon moderate or small fortunes; so equality of losses of war does not consist in paying everyone compensation mathematically equal to the loss suffered, without making any distinction according to the condition of the people, or the nature of the loss, or the kind of property destroyed or injured.

In 1915 a society called "The National Committee for Full Compensation for Losses Caused by the War" was organized under the leadership of M. Larnaude, dean of the Faculty of Law of Paris. The object which was sought was excellent, but the method adopted was faulty, because much too simple. Nothing could have been better than to wish to influence the authorities to make a practical application of the right to compensation for war losses, the principle of which had been formulated by the law of December 26th, 1914, already referred to. But we should not be and ought not to be content with this formula: full compensation for losses caused by war. We could not because we should recognize the fact that it would be impossible for the state to make good all losses caused by the war, and that it could grant an indemnity for only material losses resulting directly from military operations. We should not speak of full compensation even for material and direct losses without distinction, for to give everybody a sum exactly equal to the value of the things destroyed would be a solution contrary to equity, for too much would be given to some and not enough to

others. Finally, to talk about full compensation for war losses without making any distinction between the kinds of property destroyed, without making any distinction between capital and things to be used or consumed, would be to arrive at a solution contrary to equity, because it would be treating unequal things equally.

After all, the basis of the right to compensation is the principle of equality of national burdens. But we can arrive at such an equality only by treating different things in different ways and by determining how the indemnity should be paid, its amount, and the conditions under which it should be paid, according to the financial state of the unfortunate persons, the nature of the loss, and the character of the property which has been destroyed or damaged. The bills which have been passed by the Chamber of Deputies and by the Senate, although differing somewhat, are in accordance with this idea.

V

Losses for Which Compensation Should Be Paid and the Amount of Compensation

There is agreement on this point, that the only losses for which the state has a duty to pay compensation are those which are definite, material, and direct. By "definite losses" we do not mean only that the losses should be proved. That is a matter of evidence. But we mean that the state owes an indemnity for only actual losses and not for losses which are merely contingent or probable. The losses should be material, that is to say, capable of being estimated in terms of money. This includes not only things destroyed or damaged but also taxes, war contributions, fines, requisitions, levies in kind, and also losses resulting from the damage or destruction of French or foreign titles. Wounds and loss of life are also included.

The principle which places upon the state the obligation to pay compensation for losses during war, applies only to losses which are directly caused by military operations. However, the state can by no means avoid altogether the obligation to pay compensation for indirect losses, that is to say, losses suffered because of the war, but not caused by military operations. There are many of these losses for which the state ought to pay compensation, for example, those arising from explosions in munition factories; but the state's obligation here is grounded upon the general law of responsibility

for public service, and not upon the law applicable to losses from war.

An indemnity is due for every loss arising from military operations, whether they be acts of the enemy or of the army of the country. Before 1914 some difficulties arose in making a distinction between military operations proper and military operations which are simply preparatory or preventive. The bills of the Chamber of Deputies and of the Senate fix a very simple and exact criterion: all operations which take place in the war zone which are directed by the government are considered military operations and, consequently, compensation for the resulting losses should be paid according to the principles which apply to war losses. As for losses caused by the enemy, it is plain that no distinction should be made between the zone occupied by the armies and the interior; for example, the destruction of a town in the interior by German aviators or by long-range guns is indisputably a war loss.

Compensation is due every citizen, an individual, or a group, a private or a public person, especially administrative units (departments, communes, public institutions), commercial or industrial societies, associations, mining companies, railroad and steamship companies. As for the question of knowing whether compensation is due to foreigners, this can only be settled by an international treaty, and to accomplish this the governments must be inspired by the principle of reciprocity.

The amount of compensation can be determined only by making an economic distinction between two classes of property, the classic distinction between things to be used and to be consumed on one hand, and capital on the other, and not the distinction between movable and immovable property. Because they held to this last distinction, the French Chambers after long and sometimes confused debates voted for provisions which are open to criticism.

Compensation for movables consisting of things to be used and consumed would be equitable only if it were made to vary with the usefulness of the property and with the economic condition of those receiving the compensation. The French Chamber of Deputies has very justly taken this course; it has passed the following provisions which I think should be given unqualified approval.

Compensation amounting to half the loss shall be paid for losses of movables which are of no industrial, commercial, agricul-

tural, professional, or domestic utility, like articles of luxury such as jewelry, pearls, diamonds, laces, pictures, and tapestry.[7]

As for injuries to furniture, clothing, and personal effects, the compensation should not exceed a stipulated amount which should vary according to whether the beneficiary is single, or married with one or more children. This sum is five thousand francs if he is single, ten thousand francs if he is married, and it is increased by two thousand francs for each child or person dependent upon the beneficiary. This system is very just; the state is not burdened with the obligation to restore articles of luxury to one who had chosen to acquire them, but only to make it possible for him to re-establish the home which has been destroyed.[8]

The Chamber decided that for movable property which, while not productive capital, nevertheless has an industrial, commercial, agricultural, professional, or domestic utility, the compensation should be equal to the total value of the loss at the time of the destruction or damage of the property. There is no longer any question as to articles of luxury; consequently the entire loss should be made good. But, on the other hand, it is not necessary for the beneficiary to make a profit; the loss should be estimated as of the time of its occurrence.

Finally, there is left movable property which may be regarded as capital, that is, industrial, commercial, or agricultural tools and implements, and raw material. These should be treated like capital which consists of immovable property and the serious question of replacement arises with reference to both classes.

VI

The Question of Replacement

Shall a person who has been compensated by the state for losses caused by war be free to dispose of this sum of money just as he pleases, or ought he to use it in such a manner as to replace as far as possible the things which were destroyed or damaged? Should the payment of compensation be made conditional upon an undertaking to replace the property destroyed?

This question has been very sharply debated in France, and it still is at the time I write these lines. I ought to say at once that this question relates only to immovable property and to capital con-

7. Projet de la Chambre, art. II, § 4.
8. Projet de la Chambre, art. II, § 3.

sisting of movables. It does not and can not pertain to movables to be consumed or used, of which the owner had free use and disposition before the loss and consequently for which compensation ought to be paid without any condition or reservation. But the discussion has been extremely lively as to immovable property and capital consisting of movables (tools, implements, and raw materials); a conflict arose between the Chamber of Deputies and the Senate which retarded the passage of the law.

The following was passed by the Chamber of Deputies:

"Compensation for immovables includes all the elements necessary to replace immovable property which has been damaged or destroyed . . . The granting of this compensation is made conditional upon an undertaking that it will be used for the purpose of replacement. . . . It must be used for identical or similar purposes in the place where the loss occurred or in the same vicinity. . . . It may be the object of a total or partial exemption granted by the Compensation Court. . . . Injuries to tools and implements of industry, commerce, and agriculture, and to raw material will be made good under the same conditions as injuries to immovable property."[9]

This is how the Senate bill reads:

"Compensation for immovables includes the amount of the loss valued as of the day before mobilization and any further expense which is necessary to restore the immovable property that has been damaged or destroyed. The granting of an additional sum to cover expenses for buildings and things treated as immovables because of their purpose (movable capital, tools and implements, raw materials) is made conditional upon an agreement as to replacement."[10]

Thus, as to immovables, tools, implements, and raw materials, the Chamber of Deputies makes the granting of compensation itself conditional upon replacement, that is to say, to the replacing of the property by the beneficiary in the place where the capital was destroyed or damaged. On the other hand, the Senate decided that the beneficiary should receive compensation corresponding to the loss without any obligation as to its use and that the granting of any additional compensation for the purpose of restoring the property to its former condition should be made to depend upon an agreement as to its use.

Which solution should be accepted? My opinion is quite decided. I think that the obligation to replace the property ought to be imposed, but not to the extent which the Chamber of Deputies wishes. Perhaps, as often happens, the controversy may have

9. Projet de la Chambre, art. 4, 5, § 6, 6, 10, § 2.
10. Projet du Sénat, art. 4.

arisen and developed because the question was not clearly put and, in order to solve it, considerations foreign to the problem have been allowed to creep in.

On the one hand, the theorists who cling tenaciously to a right of property, conceived as an absolute right, hold that the right of a beneficiary to compensation ought to be absolute, just like the right which he had to the thing which was destroyed or damaged, and they assert the individual right to compensation. On the other hand, the socialists saw in the passage of a law for the compensation for losses caused by war an excellent opportunity to give legislative sanction to their principles; they maintained that the obligation of replacement should be imposed as to all immovables without distinction, and as to as much movable property as possible. Over against the individual right, they place the social right to compensation. Finally, the representatives from the invaded departments have made and still are making an active campaign in favor of an obligation to replace the property in the locality of the loss. They are moved by a desire which is certainly legitimate, but foreign to the real legal problem which is before us, a desire to reconstruct their devastated region, and to revive the activity and wealth of their departments.

We must put aside these different considerations and seek a solution of the problem from an economic and legal point of view, without preconceived notions of any sort.

In the first place, we should not forget that all buildings have not the same economic character and that consequently the same solution should not be decided upon for all of them. Dwelling houses, occupied by their owners, are not capital, but property to be used. They do not serve to produce wealth, but only to satisfy a need, just like furniture and food. M. Gide has very well pointed out this character of dwellings.[11] As for these, there neither can nor should be an obligation to replace them; the question should not have arisen. We should apply the same principle to furniture. An amount in damages should be allowed which should vary according to the size of the family of the unfortunate man. The state can no more be under an obligation to pay full compensation for the damage caused to the owners of a villa or a luxurious hotel, than it can be obliged to pay the exact value of furniture, jewels, and costly pictures; and on the other hand the owner should not be forced to replace them.

11. *Gide*, "Manuel d'économie politique," 9e édition, p. 122.

On the contrary, rented houses are capital, the same as mines, factories, farms, stores, industrial, commercial and agricultural tools and implements, and raw material. These belong to capital in the economic sense of the word. They serve to produce new wealth. As for them, the law should impose the obligation to replace the property and should make this a condition of the payment of compensation, because of the nature of the property, which should be recognized as belonging incontestably to capital.

Capital consists of the means of social production. The owner of such capital holds it on condition that he employ it in producing social wealth. Property in capital is not the absolute right proclaimed by the classic individualistic doctrine. It is a social function. A capitalist is a social functionary; he can not fail to produce wealth from his capital, because he cannot fail to fulfill his social function which results from his possession of capital. No doubt he sees profit in the enterprise; but that is the reward of his function; this is not the exercise of a natural right which exists by itself; it is the recognition of the reward of his function as a capitalist. This mode of recompense is established and is maintained because up to the present time it is the one which best stimulates initiative and intensifies production; it would disappear if it no longer accomplished this result.

Under these conditions, if capital is destroyed or damaged by military operation, he who possessed it, the head of the enterprise, should be compensated. But he can not be free to dispose of this capital as he pleases. He did not have this liberty before; he can not have it afterwards. He was obliged to make the capital which he possessed productive; he will be obliged to make the compensation productive which the state may pay him in place of what he has lost. To use a technical expression, I should say that there is a 'real' subrogation here; the compensation is of the same kind and takes the place of the destroyed or damaged capital and consequently it should be used to restore this destroyed or damaged capital.

But we should not go too far. The basis and justification of capitalistic property lie in these social advantages; the greatest productivity of capital is assured by giving free play to individual initiative and interesting the holder of capital in the success of the enterprise, who should always be able to replace or modify it. In case an enterprise has been destroyed by war, the same liberty should be granted to the contractor who receives compensation from the state. He should be able to make use of the compensation in

the way he thinks the most profitable; he must only be required to re-establish a business enterprise.

That is why I can not approve the provision of the Chamber of Deputies' bill which places upon a beneficiary the obligation to reconstruct an identical or similar business, that is, to re-establish a factory which produces things identical or similar to those manufactured in the establishment which was destroyed. And I can not give my approval to an obligation to rebuild in the place where the former business had been conducted, or in the neighborhood. To be sure, in the case of mining and farming industries, they can be re-established only upon the site of the loss. But as to industrial enterprises proper, this is not true. For the sake of national production and the restoration of the public wealth, reinvestment in the identical or a similar business should not be required, because economic conditions and national needs will be very different after the war from what they were before. Profound changes will be made; new needs will be created; many products will be demanded of national industries which had formerly been imported. The possibility of creating new kinds of manufactured goods should be left entirely to private initiative.

On the other hand, it may be in the interest of national production that certain industries be moved, for example, in order to obtain motive power at the lowest possible cost by utilizing more and more the natural energy of waterfalls. It is impossible to prevent beneficiaries from rebuilding their factories in other localities than where they were formerly, for example to forbid them to remove them into the mountainous regions of France where waterfalls would furnish unlimited motive power with hardly any expense.

To sum up, no doubt capital consists of the wealth of individuals; but this is social wealth above everything else, used by individuals who act as social agents and who have a large share in the profits of this use. If social wealth is destroyed by war, it must be restored, because there should be an equitable division of the burdens of war among all citizens, and also because the instruments of national production should be restored. The old capitalist should be put into the same condition which he had before the destruction, nothing more or less. Nothing more: he must fulfill his social obligation to use profitably the capital he has. Nothing less: his initiative should not be limited; he should not be forbidden to make changes in his business or to replace it with another; this

would be to change his former situation and that to the prejudice of national production.

Conclusion.

I make no pretensions to have studied the great problem of compensation for losses of war in all its details; but I believe I have said enough to determine its elements and the significance of its solution. It would be well to add that compensation by the state for losses caused by war ought to have as its complement the laying of new taxes upon those who have made exceptional industrial or commercial profits by reason of the war. Exactly the same ideas justify at the same time the payment of compensation out of the public treasury for war losses and the laying of exceptional taxes upon war profits.

The French legislator and the English legislator have understood this. In France, war profits are subject to a progressive tax which amounts to eighty per cent upon profits which exceed five hundred thousand francs.[12]

But if these taxes assure the treasury of funds they can not compensate for the destruction of national wealth caused by the war. It is not possible that the heaviest burdens which the abominable devastation committed by the German armies can be borne entirely by the French state. The war will only be won and a just peace will only be established when the Allies can enforce upon Germany the obligation to make reparation for the destruction which she has committed by her iniquitous aggression and by her barbarous methods.[13]

12. Loi du 31 décembre 1917, art. 4.

13. [Obviously, these lines were written before the important military events after the midyear of 1918.—Ed.]

D—MILITARY LAW

THE MODERNNESS OF ROMAN MILITARY LAW

By Charles P. Sherman[1]

Rome, as a state, had a continuous existence for more than 2200 years—from its founding in 753 B.C. to the fall of the Roman empire of the East in 1453, when Constantinople was taken by the Turks. This duration of a state is unparalleled by any other country, ancient or modern; and it probably will never again be equalled.

How came Rome to have such wonderful life as a state? What were the causes of this continuous existence of twenty-two centuries? The answer is: the supreme excellence of Rome's law and the supreme excellence of Rome's army and navy.

Rome's unsurpassable jurisprudence with its matchless justice finally permeated every part of the vast Roman dominions; it won and preserved the loyal affection of the provincial inhabitants, whether living in the Orient or the Occident, on the river Euphrates or the river Rhone. Roman civilization was based on the reign of law and of justice between man and man; and when the untutored barbarian invaders finally destroyed the Roman empire of the West, they soon confessed their lack or inferiority of law by gradually absorbing the jurisprudence of the very state which they had destroyed. "The conquest of the world by the Roman empire has passed away, but the conquest of the world by Roman law has not passed away and there is no sign that it will pass away so long as mankind endures. It rules today a wider empire than the Caesars ever knew, and its empire is ever-widening."[2]

1. [The author was born at West Springfield, Mass., June 8, 1874; educated at Yale University (B. A., 1896; LL.B., 1898; D. C. L., 1899); subsequently made studies in Roman Law at Rome and Paris. He was Instructor of Roman Law at Yale University Law School, 1905-1907; Instructor of French and Spanish Law at Yale, 1906-1907, and Assistant Professor of Roman Law, 1907-1917; was also Law School Librarian at Yale, 1906-1909, and Curator of the Yale Wheeler Library of Roman, Continental-European, and Latin-American Law, 1905-1917. He is a member of the Bar of Connecticut, of Massachusetts, and of the United States Supreme Court. He is the author of "The Maritime Law of Rome and Some Comparisons with Modern Jurisprudence" (1899), "First Year of Roman Law" (1906), "Roman Law in the Modern World," 3 vols. (1917), and of various contributions in the fields of Canon law and the modern European codes.—Ed.]

2. *Sherman*, "Roman Law in the Modern World," vol. I, § 11 (quoting *Raynolds*, "Commemorative Addresses A. S. Wheeler," p. 21).

The supreme excellence of Rome's army and navy, which for so many centuries preserved the state against innumerable hostile nations and countries, is indeed accepted too often among us modern peoples as a sort of universally recognized tradition needing no explanation. While it is generally admitted that the science of warfare must have been highly developed at Rome, or else Rome could never have overcome her contemporary enemies or even defended herself, yet it is usually overlooked that the Roman arms were superior because the Roman military and naval organizations and Roman military tactics and strategy really rested upon the firm foundation of true principles of the science of warfare discovered or applied by the Romans themselves. And much of Roman military knowledge has survived the Roman empire itself. But how rare is the modern recognition of the debt owed to Rome by modern military science! To be sure, Napoleon is recorded as studying with profit the campaigns of Julius Caesar. The topic of modern military science's indebtedness to Roman military science is one of vast scope, capable of enormous elaboration in treatment and also capable of being copiously illustrated from the recent world-war in Europe. Our discussion, however, will be limited to the principal modern aspects of Roman military law.

Conscription; volunteering. During the Roman Republic all male citizens of the military age (18 to 46 years inclusive)[3] were liable to military service, and could be conscripted by regular levies usually held yearly, or also by levies at any time if great emergencies arose.[4] Recruiting officers were generally employed throughout Italy, outside of Rome.[5] Volunteering was permissible and frequent;[6] and the legal position of Roman volunteer soldiers was the same as that of conscripted soldiers.

During the empire, although conscription was theoretically universal and without exceptions, the old regular levies of citizens for military service seldom occurred[7]—the levies were usually occasional or irregular. And volunteering became the favorite method

3. *Aul. Gell.*, x, 28; *Mommsen*, "Röm. Staatsrecht," I, 487.

4. *Livy*, xxvi, 31, 11; vii, 4, 2; xxii, 38. Usually each Roman tribe contributed merely a quota of men for military service: *Livy*, iv, 46, 1.

5. The "conquisitores": *Livy*, xxiii, 32, 19; xxv, 5, 6.

6. "Qui voluntate nomina dabant": *Livy*, xlii, 32, 6.

7. For instances of such levies, see *Suet.*, "Aug." 24; *Suet.*, "Nero," 44; *Tacitus*, "Hist.," iii, 58 (Vitellius).

for recruiting vacancies in the army.[8] Even when a levy was made, a conscript could obtain his release by furnishing a substitute.[9]

But the cardinal feature of the imperial conscription was that each locality had to furnish the necessary recruits for specified legions or other Roman troops. Thus Augustus made Italy and the West furnish the men for the Western legions, and the East for the Eastern legions—an arrangement which did much to divide the Roman empire into the fifth century partition of Eastern and Western segments. Hadrian made Africa the supply for the African and Numidian legions. Gradually the Italian peoples, from natural causes and not from any law,[10] became disinclined to take military service, and from the time of Vespasian[11] the Italians ceased to appear in the legionary service. Even the lighter city-guard infantry service rarely contained Italians after the time of Severus.[12] The recruiting for the imperial armies was effected by certain officials of high rank.[13]

Qualifications for military service; exemptions. During the republic the qualifications for army service were physical capacity, citizenship, and (in ancient times only)[14] ownership of a certain amount of property.[15] But certain classes of persons were exempted: all magistrates, priests, and persons absent on state service.[16] The consul usually passed upon the validity of exemption claims. Sometimes, in emergencies of grave danger, no exemptions were allowed.

During the empire the recruits must be citizens,[17] must not have been convicted of any serious crime,[18] must be at least 5 feet 6 inches in height,[19] and have adequate physical capacity. The physical fitness of each recruit was probably passed upon by an army-doctor attached to the legion or troop. The Roman medical

8. Dig., 49, 16, 4 § 10: "Plerumque voluntario milite numeri supplentur."
9. *Pliny*, "Epist." x, 30 (39), 1.
10. See Dig., 49, 16, 4, § 10.
11. Reigned A. D. 69-79.
12. This family reigned A. D. 193-235.
13. Known as "dilectatores," although sometimes a levy might be made by a proconsul. See *Pliny*, "Epist.," x, 30 (39), 2; *Tacitus*, "Ann.," xiv, 18.
14. The property qualification disappeared after 105 B. C., or from the time of Marius onward.
15. *Polyb.*, vi, 20, 3; *Aul. Gell.*, xvi, 10, 11. A slave could not lawfully become enrolled in the army.
16. *Plutarch*, "Camill.," 41; *Livy*, xxiii, 49, 2.
17. Dig., 49, 16, 11; Cod. Theod., 7, 13, 8. A slave who became a soldier was punished with death.
18. Dig., 49, 16, 4, §§ 7, 5, 1.
19. This standard height was known as the "incomma": *Veg.*, i, 5.

corps was a product of the empire.[20] Any minor physical defect not interfering with capacity to bear arms was not a disqualification for military service.[21]

Punishments for avoiding or trying to avoid military service. Failure to comply with a summons to military service was variously punished: sometimes by confiscation of property,[22] or by scourging or imprisonment,[23] or by selling the delinquent into slavery.[24] And, although the emperors abolished the penalty of slavery as a punishment for refusal to serve in the army,[25] yet failure to respond to service continued to be punished with great severity. A parent who attempted to conceal his son, liable for military duty, was punished with exile and also confiscation of part of his property, while the delinquent son was at once inducted into the army and placed in some inferior or disagreeable branch of military service.[26] The Emperor Trajan punished with deportation any parent who mutilated his son, in order to render him physically unfit for military duty.[27]

Induction into service by taking the military oath. It was the taking of the military oath which, during both the republic and the empire, was the formal act of induction into the service.[28] The oath transformed the civilian into a soldier.[29] To the emperor, as supreme commander-in-chief,[30] the Roman soldiers took the oath of allegiance at his accession,[31] and thereafter twice annually—on the anniversary of his accession[32] and on January 1.[33] The troops at the capital were sworn by the praetorian prefect; the provincial forces, by the provincial governor.

Officers and Common Soldiers. During the republic the higher legionary officers, known as tribunes, were originally appointed by the consul; but after the middle of the fourth century B. C., the people

20. *Tacitus,* "Ann.," 1, 65; Corpus Inscript. Lat., viii, 2872, 2874, 2951; vi, 1058; vii, 690.
21. Dig., 49, 16, 4, pr.
22. *Val. Max.,* vi, 3, 4.
23. *Livy,* vii, 4, 2.
24. Dig., 49, 16, 4, § 10.
25. Dig., 49, 16, 4, §10.
26. Dig., 49, 16, 4, § 1.
27. Dig., 49, 16, 4, § 12.
28. *Polyb.,* vi, 21, 2; *Livy,* xxii, 38; *Pliny,* "Epist.," x, 52 (60); *Tacitus,* "Hist.," i, 55.
29. Without the taking of the oath ("sacramentum" or "conjuratio") it was unlawful to fight the enemy: *Cicero,* "De off.," i, 11; *Livy,* viii, 34, 10.
30. "Imperator," "autocrator:" *Dio Cassius,* lvii, 8.
31. *Dio Cassius,* lvii, 3.
32. *Pliny,* "Epist.," x, 52 (60).
33. *Tacitus,* "Hist.," i, 55.

began to elect some of these tribunes;[34] finally the tribunes became partly elected by the people and partly appointed by the consul.[35] All other military officers, such as the legate, centurion, and various inferior officers, were appointed by the consul or by the commanding general of the army.[36] During the empire all officers were appointed or promoted by the emperor, who frequently delegated this power to certain general officers, such as a legate or provincial governor. During both the republic and the empire common soldiers could rise from the ranks to the grade of officers. The famous Marius was a common soldier who rose to be consul. The Emperor Basil, the Macedonian, was originally one of the lowest of common soldiers.

Military discipline; military courts. The life of the Roman common soldier was hard and laborious. While on the march he probably carried on his back at least sixty pounds[37] of baggage.[38] Some of the large popularity of the famous Roman general Marius among the common soldiers was due to an invention of his which enabled a soldier to carry all this burden on a board resting on a forked support strapped across the shoulders.[39]

The Roman military discipline was very severe. Every centurion carried a rod made of a vine-branch ("vitis") which he used to punish soldiers infracting military discipline.[40] This rod was the symbol of the centurionship.[41] Its modern descendants are the baton of the European field-marshal and the "sport-stick" or "swagger-stick" carried by some of the Allied soldiers when off duty. Roman soldiers who did not respect their officers or superiors were severely punished.[42] To strike an officer was punishable with death.[43] Flogging was a frequent penalty for a breach of discipline,[44] and even officers could be flogged.[45] Deprivation of the whole or part of a soldier's pay was another penalty for infraction of military discipline.[46] Degradation from rank was frequently employed as a military punishment;[47] it might include also a transfer of an offender

34. *Livy*, vii, 5, 9.
35. *Livy*, id.
36. *Livy*, xlii, 53, 34, 35.
37. Sixty Roman lbs.—equivalent to forty-five English lbs.
38. *Veg.*, i, 19.
39. *Frontinus*, iv, 1, 7.
40. *Pliny*, "Hist. Nat.," xiv, 19.
41. *Juv.*, viii, 247.
42. Dig., 49, 16, 13, § 4.
43. Dig., 49, 16, 6, § 1.
44. Dig. 49, 16, 3, § 1.
45. *Val., Max.*, ii, 7.
46. Dig., 49, 16, 3, § 1.
47. Dig., id.

from a superior to an inferior or less desirable branch of the service. An offending soldier might be dishonorably discharged or cashiered by being "drummed out" before the whole army.[48] Soldiers were forbidden to accept any civilian office or function; any violation of this rule was punished with degradation and discharge.[49] Soldiers were always tried before military courts for breaches of discipline.[50] Attached to the military courts were "quaestionarii," or official torturers, whose services might be employed in certain criminal investigations.[51]

Desertion, sedition, mutiny, and treason. Desertion in time of peace was less severely punished than in time of war, the usual penalty being degradation and loss of military privileges.[52] Desertion in time of war was always punished with death.[53] Cowardice in action and going over to the enemy while in battle were also capital crimes.[54] The death penalty was inflicted also for excessive insubordination, loss of standards in action, mutiny, and treason.[55] During the republic the death penalty was pronounced by the consul;[56] during the empire, by the emperor or some general officer of high rank.[57] Often the mode of its infliction was the terrible "fustuarium": the condemned soldier had to run the gauntlet of his whole legion or troop which fell upon him and attacked him—if by good luck the condemned escaped (for he was permitted to try to flee) he was forever exiled from his home and province.[58] When a large number of soldiers had been guilty of cowardice, mutiny, or loss of standards in action, they might be punished capitally with the savage decimation or the selection by lot of every tenth man for death;[59] sometimes only the twentieth or the hundredth man was drawn for the death penalty.[60]

48. Dig., 49, 16, 3, §§ 1 and 3; "Bell. Afr.," 54, 3.
49. Code Justin., 12, 35, 16.
50. "Militaribus judicibus": Code Justin., 12, 35, 15; also Dig., 49, 16, 4, § 5.
51. *Mommsen,* "Eph. Epigr.," iv, 421.
52. Dig., 49, 16, 15, § 1.
53. Dig., id. Where a soldier who had deserted voluntarily returned to his duty or intended to do so, he was called "emansor" and not "desertor," and his offense was not so severely punished: Dig., 49, 16, 4, §§ 14-15.
54. Dig., 49, 16, 6, §§ 3 and 11.
55. Dig., 49, 16, 6, §§ 2 and 4; Inst., 4, 18, § 3; Dig., 49, 16, 3, §§15, 18, 21, 22.
56. *Dionys.,* xi, 43.
57. *Dio Cassius,* lii, 22, 3.
58. *Livy,* v, 6, 14; *Cicero,* "Phil.," iii, 6, 14; *Tacitus,* "Ann.," iii, 21.
59. *Livy,* ii, 59 (the case where Appius Claudius inflicted it on his mutinous army); *Suet.,* "Aug.," 24; *Suet.,* "Galba," 12; *Tacitus,* "Hist.," i, 37.
60. *Capitol.,* "Macrin.," 12.

Soldiers' pay. In Julius Caesar's time the common or private legionary soldier received about $4 a month.[61] A century later this sum was increased to $5 a month.[62] Common soldiers in certain favored troops got $6 a month.[63] There is little information extant concerning the pay of officers: but in the third century the superior officer known as legionary tribune received $1150 a year as his pay.[64] The cost of the soldier's food, clothes and equipment were, during the republic, deducted from his pay;[65] and, although during the empire the state supplied the soldier with his food,[66] yet considerable of the old republican deductions continued for some time under the emperors.[67] Frequently, for distinguished service, a soldier received increased pay.[68] But the empire inaugurated the monetary distributions known as donatives, which became the rule upon an emperor's accession.[69] Hadrian gave $6 a head when proclaimed emperor, and $12 a head when he arrived at the city of Rome.

Other privileges and rewards of soldiers. During both the republic and the empire, soldiers and sailors in active military or naval service, had special privileges as to marriage, inheritance, and the making of wills. The last privilege was a relaxation of the number of witnesses and other formalities required for the making of a will.[70] It was Julius Caesar who first relaxed the formalities in regard to soldiers' wills; and this privilege was definitely incorporated in Roman testamentary law by the Emperor Trajan.[71]

Soldiers' decorations. The Roman soldier might receive various decorations for his valor or distinguished service. These honorary rewards were the crown, ovation, and triumph. A general might bestow the crown upon a soldier, or an army might honor its general

61. 225 denarii a year: *Suet.*, "Caesar," 26; *Pliny*, "Hist. Nat.," xxxiii, 45.

62. 300 denarii a year: *Suet.* "Dom.," 7.

63. The "cohortes urbanae": *Dio Cassius*, lvi, 32, 2; lix, 2, 1, 3.

64. See Inscription of Torigny.

65. *Polyb.*, vi, 39, 15. Caius Gracchus tried to have a law passed whereby the state should provide clothes for soldiers: *Plutarch*, "C. Gracch.," 5.

66. *Veg.*, ii, 19; iii, 3.

67. See the complaints in the time of Tiberius by soldiers who objected to supplying out of their pay "vestem, arma, tentoria," *Tacitus*, "Ann.," i, 17.

68. Corp. Inscript. Lat., viii, 2564; *Varro*, "Lin. Lat.," 90.

69. *Suet.*, "Aug.," 41, "Tib.," 20, "Nero," 7; *Tacitus*, "Ann.," xii, 41; xiii, 31.

70. See *Sherman*, "Roman Law in the Modern World," vol. II, § 688, (2).

71. Dig., 29, 1, 1, pr.

with a crown.[72] The crowns were of various sorts and differed in the honor ascribed to them. The highest crown of all was the obsidional, which was given by a besieged army to the general who rescued them.[73] Augustus received such a crown from the senate. The next highest was the civic crown, which was received by a soldier who saved the life of a Roman citizen in battle.[74] The naval crown ranked next in order: it was a golden crown given to the sailor who first boarded the enemy's ship.[75] Next came the golden mural crown, presented to the soldier who first scaled the walls of a besieged city or forced an entrance into the fortified camp of the enemy.[76] The next in order was the triumphal crown worn by a general while celebrating his triumph.[77] At first the triumphal crowns were made of laurel, and later of gold. Frequently the provinces voluntarily presented gold crowns of great value to a victorious general, as soon as he was decreed a triumph; which practice subsequently degenerated into a tribute exacted from the provinces whether willing or unwilling.

Length of service of soldiers; discharge of soldiers. During the republic a legionary soldier could not receive an honorable discharge until he had served 16-20 years in the army.[78] During the empire length of service was finally fixed at 20 years for legionaries, and 25 years for auxiliary troops.[79] These soldiers were then called veterans "veterani," and could obtain an honorable discharge[80] from active service. But veteran soldiers often continued in active service long after they were entitled to be discharged.[81] Although the giving of discharges really was a function of the emperor, yet it was often delegated to a legate or other general officer of high rank.[82] With a soldier's discharge went a grant of land or a sum of money varying from $600 to $1000.[83] If a soldier became permanently ill or disabled he was entitled to an honorable discharge,[84]

72. See *Aul. Gell.*, v, 6, *Marquardt*, "Röm. Staatsverw.," II, p. 556, where a full account of the crowns and their bestowal is given.
73. "Corona obsidionalis," made of grass or wild flowers gathered from the place of siege.
74. "Corona civica," made of oak.
75. "Corona navalis, vel rostrata."
76. "Corona muralis, corona castrensis."
77. "Corona triumphalis."
78. *Polyb.*, vi, 19.
79. *Tacitus*, "Ann.," i, 17, 78; Dig., 27, 1, 8, § 9; Code of Justin., 7, 64, 9.
80. "Honesta missio."
81. Corp. Inscrip. Lat., iii, 2818, records cases of soldiers serving on the active list 38 and 48 years.
82. Corp. Inscr. Lat., iii, 1078, 1172.
83. *Dio Cassius*, lv, 23, 1; lxxvii, 24; *Suet.* "Cal.," 44; Dig., 49, 16, 13, § 3.
84. "Causaria missio:" Dig., 49, 16, 13, § 3.

which, however, usually carried with it no perquisite. A dishonorable discharge has already been considered.[85]

The commissariat; 'quartermaster's corps'; army artisans. The Roman armies, especially during the later republic and the empire, had a very highly organized commissariat. Wheat was the usual and favorite food of the soldiers. Barley was sometimes given to them as a punishment.[86] Rations for usually seventeen days were carried by the imperial armies.[87] Wine was frequently served out,[88] although there were Roman generals who positively refused to include it in the army rations because it tended to subvert discipline.[89] Luxuries were supplied by the sutlers,[90] whose "canteens" followed an army. It was the Roman practice to support an army by quartering it in towns, or by requisitioning food supplies from tributary or conquered states.[91]

The various army storehouses were in charge of clerks.[92] A large force of clerks attached at the central or divisional headquarters kept the army's accounts, procured supplies, and took care of all the vast civil business affecting the army, including transportation of army- and food-supplies. Attached to every army were numerous artisans, such as carpenters, ironsmiths, coppersmiths, stonecutters, masons, wood-burners, charcoal-burners, leather-workers, and munition-makers of all sorts, for instance the makers of helmets, bows, javelins, swords, horns and trumpets.[93]

'Medical corps.' Every Roman army had its doctors to look after the soldiers' health. During the republic the chief military officers used to be accompanied on their campaigns by their private physicians, who administered medical assistance to the favored few.[94] But early in the empire a regular medical corps or department was organized for the imperial standing army.[95] Each legion, troop, or garrison had its army doctors ("medici").[96] These physicians had special privileges, were exempted from certain heavy municipal civic

85. See supra, "Military discipline," and Dig., id.
86. *Veg.*, i, 13; *Livy*, x, 44; *Suet.*, "Aug.," 24.
87. *Amm. Marc.*, xvii, 92.
88. *Veg.*, iii, 3.
89. *Spart.*, "Pesc.," 7.
90. Known as "lixae": *App.*, "Hisp.," 85.
91. *Cicero*, "Pro imp. Pomp.," 13; *Caesar*, "Bell. Gall.," i, 16, 6, "Bell. Civ.," iii, 5.
92. "Principales."
93. See Dig., 50, 6, 7.
94. *Plutarch*, "Cato minor," 70; *Suet.*, "Aug.," 11.
95. *Vell*, ii, 14; *Tacitus*, "Ann.," i, 65.
96. C. I. L., viii, 2872, 2874; vi, 1058; *Mommsen*, "Eph. Epigr.," iv, 550.

burdens, and often got double pay, especially when on board the fleet.[97] Every garrison had its own hospital,[98] and there was a hospital for every three legions. Attached to every hospital were a number of male nurses,[99] who were subject to the chief medical officer.[100] Even the horses and pack-animals had an infirmary,[101] which was in charge of specially trained veterinary doctors.[102]

'Chaplains.' Every Roman arms had its religious officers or priests, who took charge of all sacrificial rites and religious observances performed for the army's success or deemed necessary for the religious welfare of the soldiers.[103]

Soldiers in peace times constructed public works of all sorts. It was the Emperor Probus who declared that "soldiers must not eat the bread of idleness."[104] First and foremost the soldiers were constantly drilled and marched; they were also trained in all gymnastic exercises (such as running, jumping, fencing, swimming) which would make them efficient soldiers.[105]

Moreover, public works were constructed by soldiers as part of their peace-time functions.[106] They built temples and edifices for cities.[107] During the republic they built occasionally roads and canals, and diverted the courses of rivers.[108] During the empire, the soldiers were kept busy on public works of all sorts. Among these were: frontier fortifications, such as the wall of Hadrian, or Picts' wall in England; the vast network of Roman military roads which extended all over the empire;[109] the maintenance of the existing fortifications wherever located; the construction of bridges, canals, temples, theatres; the dredging of rivers and harbors; the planting of vineyards; endeavors to destroy the locusts; working in the mines of the state.[110]

---

97. Dig., 50, 6, 7; C. I. L., x, 3443.
98. "Valetudinarium."
99. Dig.. 50, 6, 7.
100. Known as "optio valetudinarii": C. I. L., viii, 2563.
101. "Veterinarium."
102. C. I. L., v. 2183; Dig., 50, 6, 7.
103. C. I. L., viii, 2586, 57. An instance of the religious officers of a Roman army was the "haruspex."
104. *Vospisc.*, "Prob.," 29.
105. See Code of Justin., 3, 43, 1.
106. No soldier was allowed to work for a private individual: Dig., 49, 16, 12, § 1.
107. Dig., 50, 16, 17, § 1.
108. *Livy*, xxxix, 2, 6; *Plutarch*, "Sulla," 16; *Caesar*, "B. G.," i, 8, 1.
109. Even the veteran soldiers were not exempt from road-making: Dig., 49, 18, 4.
110. A very severe punishment, rarely inflicted on a soldier: Dig., 48 19, 28, pr.; Dig., 49, 16, 3, § 1.

The Roman attitude towards war. To the Romans the tradition that they were the children of Mars[111] was naturally a source of pride and glory, especially in the era of pagan Rome. But did the highest and best Roman ethical thought evidence nothing but a blind devotion to war, a love of war for war's sake? Were all the Romans intoxicated with warfare like the rabid jingoes found in modern nations? The answer is "no."

Cicero, the greatest of Roman statesmen and philosophers, says: "War should not be waged by a highly civilized state, except to preserve either its religion or its existence";[112] "Let wars give way to peace";[113] "Let no man love himself more than his fellowman."[114]

And the great historian of the wars of the Roman republic, the brilliant and learned Livy, epitomized the answer of the highest Roman ethical thought when he wrote: "War brutalizes men."[115]

111. Rea Silvia, the mother of Romulus and Remus, named the god Mars as their father: *Livy,* i, 4.

112. "Nullum bellum suscipi a civitate optima, nisi aut pro religione aut pro salute:" "De republica," 3, 23.

113. "Cedant arma togae": "De officiis," 1, 20.

114. "Nihilo sese plus quam alterum homo diligat:" "De legibus," 1, 12.

115. "Efferari animos militia": *Livy,* i, 19.

PART IX

LEGAL HISTORY

PRELIMINARY NOTES UPON THE ANGLO-SAXON DOCUMENTS OF THE EIGHTH AND NINTH CENTURIES

By Francesco Brandileone[1]

The Anglo-Saxons, like all the other medieval Germanic peoples, borrowed from the Romans the practice of putting into writing their most important legal documents, which in most cases had reference to the holding of real estate; and all the information available to us gives rise to the supposition that the Roman clergy who took refuge in England between the end of the sixth and the beginning of the seventh centuries were the ones who helped most to spread the use of documents. Nor may it seem improbable to hold that a sign of the prevailing ecclesiastical origin of the Anglo-Saxon charters might be sought in the word "liber," which was adopted there in preference to all others in the sense of "formal document."

Now, if we reflect that "liber" in this sense is the proper word for the Holy Scripture, it will not seem extraordinary that it should have been put into circulation by the Roman priests. Augustine and his associates, Theodorus and the others who accompanied him, could not have been ignorant of that famous passage in Jeremiah,[2] in which a deed to real property is called "liber"; and, therefore, nothing is more natural than that when these priests offered or were called upon to put into written form grants, especially grants to the church, they should make use of similar language.

Nevertheless, if this became common, it did not remain the exclusive practice, because, besides the word "liber," others, not a few, were employed to designate a completed document of legal im-

1. [Former professor in the University of Parma; Cavalier of the Order of SS. Maurice and Lazarus; Cavalier of the Order of the Crown of Italy; doctor honoris causa of the University of Athens; now president of the law faculty of the University of Bologna, the earliest of modern universities. The author is noted as an authority on Canon law and on medieval legal history. Among his publications we find a collection of essays under the title, "Saggi sulla storia della celebrazione del matrimonio in Italia," (Hoepli, Milano, 1906), and the following monographs: "Note sull' origine di alcune istituzioni giuridiche in Sardegna durante il medioevo" (1902); "Le così dette clausole al portatore nei documenti medievali italiani," (1903); "Sulla data del pactum giurato dal Duca Sergio ai Napoletani," (1900).

This translation (from the Italian) is by George F. Deiser, Esq., of the Philadelphia bar.—Ed.]

2. Jeremiah, xxxii, 9, et seq.

portance, which was also called "libellus," "carta," "cartula," "documentum," "pagina," "scriptura," "descriptio," "telligraphum," "chirographum," "syngrapha," or "scedula." But of all these terms the one term that continued to be most employed was "liber," and this undoubtedly arose from the fact that when it was desired to designate a document by a word in the vernacular, the word adopted was that which most nearly corresponded with "liber," and that word was "bôc."[3]

Learned and important studies have been made in recent years concerning the Anglo-Saxon "libri" collected in Kemble's Codex and in Birch's Cartularium. But although the Roman and ecclesiastical origin of these terms is generally recognized, and we have thus learned both their formal as well as their intrinsic value, nevertheless, it would seem that in order to arrive at sound conclusions, a more thorough research should be made by comparing the Anglo-Saxon documents with the Italian documents of the Middle Ages.

The object of these preliminary notes is merely to begin such a research by treating briefly two questions, the effect of a document in making a contract and the efficacy of a document in transferring property.

I

As to the formation of contracts, whoever reads the Anglo-Saxon charters cannot help being struck by the great similarity not only of the substance but also in the words of the prologues to these charters and those of the Italian charters. In both cases, two things are established: in the first place, that in order to form a contract words are sufficient; and in the second place, that the function and efficacy of writing consist in preserving for the future the proof of the agreement entered into verbally, thus avoiding every possible dispute. And so we cannot but feel great doubt in regard to the conclu-

3. [The readers of *Pollock* and *Maitland* will be familiar with the exposition at the end of the chapter on Saxon Law, which does not merely define, but describes the meaning of book-land, or bôc-land. There were two kinds of tenures: one was called folk-land, and the other was called book-land. Folk-land was held by what is termed a customary tenure, and it was difficult to transfer the title. On the other hand book-land was land which carried with it a certain amount of dominion. The book-land was easier to transfer and the folk-land was more difficult. The real distinction seems to be that folk-land was held without written title, under customary law, whereas book-land was held by some written evidence of title. The book-land is the original name for a title which was freely transferable for the reason that written evidence of title could be produced.—Tr.]

sions recently stated by Holdsworth[4]: "The Anglo-Saxon land-book may have been used not merely as the evidence of a conveyance, but as the conveyance itself."

Let us look, for example, at the prologues of some Anglo-Saxon charters:

Kemble[5]: "Quamvis *solus sermo* sufficeret ad testimonium, attamen *pro cautella futurorum temporum,* ne quis forte posterum fraudolentam ignorantiae piaculum perperam incurrat idcirco scedulis saltem vilibus pro ampliore firmitatis supplemento necessarium reor adnectere."

Kemble[6]: "Si ea, quae quisque . . . hominibus *verbo suo* largitur et donat, stabilia igitur potuissent durare supervacaneum videretur ut litteris narrarentur et firmarentur. Sed. . . ."

Kemble[7]: "Ea quae secundum ecclesiasticam disciplinam ac sinodalia decreta salubriter definiuntur, *quamvis solus sermo sufficeret,* tamen pro evitanda futura temporis ambiguitate fidelissimis scripturis et documentis sunt commendanda."

Of the numerous Italian documents, in the prologues of which these two principles are stated, I shall limit myself to quoting only a few.

Regesto di Farfa[8]: "Licet in bona fide *sola verbi optineat conventio firmitatem,* oportet tamen ea, quae inter partes conveniunt, per scripturae testimonium roborari, ne prolixitas temporum aliquid oblivionis adducat, ut quandocunque recensita fuerint omnem totius litis amoveant quaestionem."

Regii Neapol. Arch[9]: "Quoniam certum est, quod omnis secu-

4. Law Quarterly Review, XXXI (1915), p. 17.

5. I, n. 52, a. 704: [Although the spoken word is enough, to provide for the future, lest someone might try to perpetrate a fraud, therefore for greater security against the base a writing is annexed.]

6. I, n. 78, a. 734: [If anyone wish to make a gift by words, in order that it may endure, it were better to have it set down in writing.]

7. I, n. 104, a. 759; Cfr. K. I n. 157, a. 789; VI, n. 1247, a. 963; IV, n. 913 s.a., ecc. ecc.: [As to those things to be done according to church rules, while the spoken word is enough, to avoid ambiguity in the future, a written document is to be commended.]

8. III, n. 428, a. 998, Rome. Compare also Farfa III, n. 470, a. 1005, Rome; IV, n. 650, a. 1011; n. 628, a. 1012; III, n. 504, a. 1017; IV, n. 647, a. 1030: [Although in good faith words alone are sufficient for a contract, it is fitting, nevertheless, that those matters agreed upon by the parties, should be fortified by writings, to avoid the forgetfulness caused by the lapse of time, in order that all source of debate may be avoided.]

9. Mon. IV, p. 269, n. 367, a. 1036—Capasso, Regesta Neap. n. 458: [Since it is certain that every secular matter transacted in the company of good men would suffice by words only, if the life and memory of men were enduring; the witnesses might themselves be difficult to produce—but because of the frailty of flesh it is well to have a writing signed to avoid doubt in the future.]

laris causa, que coram presentiam vonorum hominum statuitur, *tantummodo verbis firmitatis subsistere poterat,* si bitam hominibus et memoriam rerum fixa in perpetuum prestita fuisset: eos denique testes semper homo cum bellet presentes abere; set propter fragilitatem carnis competit hoc ipsum scripture interbeniente firmari, ut, horta inpostmodum dubietatem. . . ."

Gloria, Cod. dipl. Padovano[10]: "Quamquam *omnis promissio solis verbis* firma et immobilis teneri debeat, tamen ne ea que promittuntur oblivioni tradantur, dignum fore duximus, quatenus *secundum oris dicta carta monstretur inscripta.* Quopropter *ad memoriam futurae posteritatis.* . . ."

Other expressions more or less similar are to be found both in the prologues of the Anglo-Saxon charters and in those of the Italian charters, suggesting the prevailing ecclesiastical origin attributed to the exclusively evidentiary value of writing in the formation of contracts; but I do not intend to dwell upon this subject now, but I shall content myself with citing a certain Anglo-Saxon prologue, which, so far as I know, has not a parallel among the Italian charters.

Kemble[11]: "Omnes *firmas statutiones* nostras litterarum serie *confirmamus,* ne posteris cadant ex memoria precedentium decreta patrum, *Graecorum ad hoc imbuti exemplis, qui quicquid scire volunt litteris tradunt ne ex memoria labetur.*"

The Greek origin of the importance of putting serious matters into writing is in accord with other traces of Greek culture among the Anglo-Saxons, which may be seen not only in the charters, but which is also mentioned by the Venerable Bede. And the explanation of all this probably lies in the fact that the Graeco-Byzantine element was largely represented among the Roman clergy when the missionaries stationed in England took their departure.

It should be understood, however, that the remarks which have been made in regard to the value attributed to *words* in the formation of contracts, do not mean that such a principle borrowed from the Roman ecclesiastics was entirely substituted for the old norms of the national customs of the Anglo-Saxons.

10. II, n. 42, a. 1100: [Although all agreements by words alone should be binding; nevertheless lest those who promise, forget, it is wise that the spoken word be put down in writing as a record for posterity.]

11. [We set down all our solemn documents in writing, in order that our posterity may have a record of our acts, after the manner of the Greeks, who set such matters down in permanent form, lest they fade from memory.]: n. 169, a. 781. Compare I, n. 181, a. 802; II, n. 313, a. 883; I, n. 76, a. 799.

II

So far as the real efficacy attributed to the Anglo-Saxon document, the land-bôc, in the transfer of real property is concerned, the doctrines brought into vogue by Brunner are well known. He, as a matter of fact, merely helps to complete and develop the hints of Schmid,[12] who says, "Die Ausfertigung der Urkunde und *die Uebergabe derselben scheint* bei den Angelsachsen zugleich die Uebertragungsform von Besitzrechten gewesen zu sein."

Brunner's explanation of this statement[13] consists in his holding that upon the alienation of property by means of a document given by the vendor in favor of the vendee and certified in his name, the document itself was given the name of "carta primitiva," ("liber antiquus," "codicellus originalis," "chirographum primitivum"), and the land to which the deed referred was given the name of bôcland ("terra ex scripta possessa"), and it was identified in this way with the deed or charter so that the successive legal transfers of the one became the transfers of the other. "The legal significance of an original deed lay not only in the creation of bôcland, but consisted also in this, that successive alienations, intended to transfer the rights of the grantor to others, could only be accomplished by means of a charter, with the object of conveying all the rights of the grantor to others. The 'traditio' of the original deed was essential to the transfer of the land to which it had reference."[14]

Thus, so far as the Anglo-Saxons are concerned, if the original deed were not in fact provided with the so-called clause to the holder, which may be found in the Italian documents and especially those of Salerno relating to the conveyance of real property, and were purely and simply an unwitnessed charter to a definite person, this nevertheless would have operated as a delivery of title to the buyer, thus giving rise to a sort of real property in the holder. In order to effect a new transfer of the property to which the charter referred, the delivery of the charter was no doubt sufficient. Thus, as Brunner has pointed out,[15] there must have existed in Anglo-Saxon law a principle diametrically opposed to that expressed in the Code of Justinian, iv, 19, 21.

But if on the one hand we consider the proofs produced in support of the theory of the real efficacy in the transfer of land attributed to the "landbôc," and if on the other hand we compare the

12. "Gesetze d. Angelsachsen," p. 537.
13. "Rechtsgesch. der Urk.," p. 151 et seq.
14. *Brunner*, op. cit., p. 167.
15. *Brunner*, op. cit., p. 169, note 1.

medieval Italian practice of delivering to the grantee all former titles showing the rights conveyed by the grantor with the Anglo-Saxon practice of delivering to the new owner the original deed and the other charters prior to his acquisition of title, we shall see quickly how slight are the foundations upon which the theories of Brunner are based.

First of all, Brunner asserts[16] that the Anglo-Saxon legal language employed to indicate the act of delivering the document, the "traditio libri," was the word *gebôcian* or *bôcian;* and in proof of this assertion he cites, in the first place, a document of the year 909,[17] in which the phrase of the Latin text, "eam (terram) tibi *per cartam* tradam," is rendered in the Anglo-Saxon text by the words: "to bocianne." In the second place, he observes that the expression "bôc bôcian" is employed in the rubrics of the documents as equivalent to "cartam tradere" and that another expression, "bôc syllan," is used in the same sense.

But, without deciding the question as to the identity of "cartam tradere" and "tradere per cartam," it does not seem that the facts justify the deductions of Brunner.

If it be true, first of all, that in Kemble,[18] the Latin words "eam (terram) tibi per *cartam tradam*" are equivalent to the Anglo-Saxon "to bocianne," it is also true that in Kemble[19] we read in the Latin text: "Ego A. *scripto inserui istam terram* ad ecclesiam s. M.," and in the Anglo-Saxon text: "A. *gebôcade this land* intô s. M."; and in Kemble[20] we find: "Telligraphum quod A. suis antecessoribus praescripsit," and: "Bôc . . . the A. his yldran gebôcade."

The phrases "inserere terram scripto" and "telligraphum prescribere" adopted as equivalents of "gebôcian," do not in any sense imply the delivery of a document to the transferee.

It is true, however, that in the rubrics we frequently find the expression: "This is the 'bôc' (landbôc) of certain land which N N. *gebôcade* to N N." Thus, in Kemble[21] for example, we read, "This is thâra VIII hîda landbôc . . . the Eâdgâr cyning *gebôcade* T. on êce yrfe."

But there is no reason for asserting that such an expression corresponds more exactly to the Latin text "quem librum N N. tradidit N N." than to the other, which reads "quem librum N N. scrip-

16. *Brunner*, op. cit., p. 154.
17. *Kemble*, n. 1089.
18. N. 1089; *Thorpe*, "Dipl.," p. 161.
19. V, n. 1129.
20. VI, n. 1347.
21. II, 489, a. 962; III, 546, 592, 597, 636, etc.; IV, 743, etc.

sit (conscripsit) N N." since in an etymological sense "bôcian" and "gebôcian" could have only the second meaning. This is borne out, at any rate, by numerous rubrics.[22]

We finally read in Kemble:[23] "Ego, E. abbas *notifico et declaro in hoc cirographo* quod ego *tradidi* Stamarcoto terras . . . ," which makes it clear that the delivery of the deed ("traditio") did not actually have any real value as a means of transferring title which has been attributed to it.

So far then, as concerns the general medieval Italian practice, according to which the charters of purchase or of sale of real property did not remain in the hands of the purchaser and his heirs, if they conveyed the real property by whatever title to a third person, but passed with the property and the new deed (if a new deed were made) into the hands of the new owner, I make no remarks now, as I have already elsewhere discussed the subject.[24] I shall confine myself, therefore, to comparing certain Italian and Anglo-Saxon usages, by which the original charter (land-bôc) and the other charters passed from the hands of the first to those of the later landholders. It would seem also that the recent studies of Vinogradoff upon bôcland[25] have added weight to the theories that the landbôc had to accompany the legal transfers of the land.

So then, in the early Middle Ages in Italy, as well as in the Anglo-Saxon period in England, whenever land was conveyed, by whatever sort of title, in most cases the vendor gave to the vendee not only a deed to the land, but he usually gave his own title papers with the land, or the documents which he had received when he took title.

Here are some examples of it—Kemble[26]; Thorpe[27]: A dispute concerning certain property between the Archbishop of Canterbury and the Abbess Cynethrita was settled by an agreement in which it was provided, as stated by the archbishop himself, "ut ipsa abbatissa a me percipiet nominatum coenobium *cum suis inscriptionibus,* et ego terras *et libellos illarum terrarum,* quas mihi reddidit, ab ea acciperem."[28]

22. See Kemble III, app. n. 366: "A. rex haec in scripto . . . roboratum est": [The king has decreed this in writing.]
23. VI, n. 1317, a. 1022.
24. See Riv. di. dir. commerc., XII (1914) fasc. 10.
25. See English Historical Review, VIII, (1893) p. 1, et seq. and "Melanges Fitting," II, p. 501, et seq.
26. V, n. 1019, a. 798.
27. P. 40.
28. [The said abbess will receive from me the said monastery with its documents (of title) and I shall receive from her the lands and the titles to them which she transfers to me.]

The archbishop then released to the abbess the monastery in question and the documents ("inscriptiones") relating to it; and the abbess in turn gave to the archbishop certain lands and the "libelli" thereto belonging .

Kemble[29]: Wulfric grants to the Church of Canterbury, as he says, "terram juris mei . . . quam rex Eadredus mihi dedit in perpetuam hereditatem . . . *cum libello eiusdem terrae.*"

This "libellus" was the document by means of which King Eadred had given the said land to Wulfric *in perpetuam hereditatem.*

Thorpe[30]: "Emit Aethelmannus a me (says the grantor) *cum triginta libris* duodecim mansiones de villulis . . ."

In those cases, in which the title of the vendee referred not only to the real estate granted, but also to other property remaining in the possession of the grantor, the practice was not uniform. Sometimes the grantor transferred to the grantee the deed, but reserved the right to have it at his disposal as often as it might be necessary in order to protect that which remained in his possession.

Thorpe[31]: Spouses give to a church certain lands together with the deed, but upon the explicit condition that it should always be at their disposal whenever they might have need of it. After having made use of it, they were to return it to the church.

In other cases, the grantor made no delivery of his deed, but retained it because it related to other property not included in the conveyance. In such cases, he either made a note upon the deed which he retained, or he struck out of the deed the description of the property granted.[32] And sometimes it seems that an abstract was made of the old title kept by the grantor, and this was given to the grantee.[33]

More frequently, however, although that was not usual in Italy, the grantor made no mention in the charter of the delivery of the title-deed to the grantee. Despite this omission, the delivery actually took place, as shown by an example given by Brunner.

In this way the title-deeds of the former owner thus passed with the real property itself into the hands of the grantee, and became parcel of the inheritance of the grantee; and he, to maintain his title, took over, not only the new charter to himself, and the former deeds, but also the legal proceedings necessary to the conveyance.[34]

29. II, n. 414, a. 947: [. . . the land under my jurisdiction which King Eadred gave to me in perpetuity with the deed to said land.]

30. P. 299, a. 1005: [Aethelman buys from me twelve manors of the town for thirty pounds.] See also *Thorpe,* p. 206, a. 962; etc., etc.

31. P. 588, s.a.

32. *Kemble,* I, n. 109, a. 762; V, n. 1032, a. 824; I, n. 220, a. 825.

33. *Kemble,* I, n. 104, a. 759.

34. [It may not seem amiss to explain that prior to the well-known

And although at times in the legal proceedings which were a part of the transfer, as happened also in Italy, the actual transfer of the documents did not take place, even if the grantor did deliver the title-deeds to the grantee, it was not this delivery which conveyed the title.

So, if Brunner makes this assertion, it is solely because he has neglected the value of mere words in the transfer of property. Such transfers could be made not only in imitation of the Roman practice introduced into England by the clergy—especially in the case of testaments—but could also be made, and in fact were made, in accordance with ancient national customs, as Vinogradoff has so well shown.[35]

As to this and other questions, I hope to take them up more at length in the future, but on this occasion I shall content myself with some remarks upon Brunner's interpretation of Kemble.[36]

King Aethelred, in a charter signed by himself, had given to two women a piece of ground for the erection of a monastery. When the donee, Dunna, was about to die, she verbally left to her granddaughter, Hrotwari, the monastery which had already been erected, *together with* the charter of the king, or *not only* the monastery, but *also* the charter. "Praefata Dunne constructum in praedicto agello *monasterium cum agris suis nec non et cartulam* descriptionis agri . . . filiae suae in possessionem ad dominum migratura largita est." Whence it may clearly be seen that both the lands and the *cartula descriptionis* were regarded as *appurtenances* of the monastery, exactly as in the case of the Italian charters.

But since Hrotwari was then an infant, the *procuratio monasterii* and the title-deed were delivered to her mother, from whom they were stolen, and she could not deliver them to her daughter when she became of age, and she therefore could not rule the monastery. Now as King Aethelred had made the grant "in jus ecclesiasticum sub libera potestate," and in addition the grandmother of Hrotwari had provided that the land and the monastery constructed upon it after the death of the granddaughter should go to the Church of Worchester, the matter was referred to the synod, who decided that "hanc cartulam donationis vel regum vel supradictae Dunnan mani-

recording acts of today, the only fashion in which a conveyance could obtain the notoriety necessary to inform the world that it was a title good against all the world, was to begin a fictitious lawsuit, which the grantee must win, and have the court enter a public judgment that the land was his.—Tr.]

35. *Vinogradoff*, "Transfer of Land in Old English Law," Harvard Law Review, May, 1907, p. 532.

36. I, 82, a. 734.

festissime describi, prefataeque abbatissae Hrotwari reddi, eiusque possessionem monasterii firmissimam esse." The Synod then ordered that the charter in question be executed, and it took the place of the former document left by the king to Dunna and of the gift by parol made by Dunna in favor of the granddaughter. This was aside from the penalties laid upon the one who had stolen the original charter.

From this document Brunner deduces the first evidence of his assertion that the simple delivery of the original charter was sufficient without anything else to transfer the land to a third person. But when, after having set forth the document, he writes: "Der vorgang lässt deutlich ersehen, dass es sich nur um *eine* Urkunde, die Urkunde Aethelreds für Dunna, handelte und dass somit die *Vergabung an Hrotwari nur durch den liber antiquus* erfolgt war."

It seems to me that this interpretation of the documents is very arbitrary to say the least. The document does not say that Dunna makes a gift to Hrotwari "*per* cartulam descriptionis agri" or "*mittelst* der Erwerbsurkunde," as Brunner says, but it really says that being near death, he left to the granddaughter "constructum in pred. agello monasterium cum agris suis, *nec non et* cartulam descriptionis agri . . ." The mistake of Brunner consists in having given the same meaning to *mittelst* and to *durch* as to the words *nec non et*. The gift of Dunna has two elements. First, the monastery with the appurtenances thereto and the title-deed. And likewise to the mother of Hrotwari during the minority of her daughter is confined the "*cartula* conscripti agri *nec non et* omnis monasterii procuratio." The synod decided that "hanc cartulam donationis . . . describi (et) possessionem monasterii firmissimam esse." Now when the new charter was substituted for the old one the synod decided that the abbess having died, it should go to the Church of Worchester, "liber hic *cum* terra."

And in note 124, a. 772, it may be seen that this is what actually happened, and the bishop when making a new grant of the said monastery is aware of the origin of the gift and the changes of title and says that Dunna, the founder "praefatam terram *post se reliquit possidendam Hrotware abbatissae cum conscientia atque licentia Ecgwini episcopi;* et illa Hrotwara abbatissa mihi in jus propriae libertatis atque possessionis largita est."[37] This records the transfers of the thing, but not the transfers of the charter.

37. [. . . left the possession of the said land to the abbess Hrotwari, with the knowledge and permission of Bishop Ecgwine, and the abbess Hrotwari conferred on me the title and possession of the property.]

THE EARLY HISTORY OF THE ATTORNEY AND SOLICITOR GENERAL

By W. S. Holdsworth[1]

The attorney and solicitor general are not medieval officials. In the Middle Ages the king had his attorney or attorneys, his serjeants, and, from the reign of Edward IV onwards, his solicitor; and these officials shared between them some of the work done by the modern attorney and solicitor general. But the offices of attorney and solicitor general only began to assume their modern shape in the course of the sixteenth century; and it was not till the end of the seventeenth century that they in substance attained it. By that date they had become legal advisers of the crown. Either by themselves or their deputies they appeared on behalf of the crown in the courts. As the legal advisers and deputies of the crown they gave legal advice to all the departments of the state, and appeared for them if they wished to take action in the courts. Like the judges, they received writs of attendance requiring them to come to Parliament to give their advice to the House of Lords. But unlike the judges, one or other of them was always a member of the House of Commons. They were coming to be regarded as the leaders of the bar, and as its representatives if it wished to take collective action.[2]

I propose to consider (I) the history of the process by which the law officers of the crown attained this position; and (II) the reasons why the king's attorney and solicitor attained this position during the latter half of the seventeenth century.

---

1. [B.A., Oxford, 1893; M.A., B.C.L., 1897; D.C.L., 1904; Barrister of Lincoln's Inn; Lecturer at New College, 1895; Vice-President of St. John's College, 1902-3; Professor of Constitutional Law at University College, London, 1903-8; now All Souls Reader in English Law in the University of Oxford, and Fellow and Lecturer in Law in St. John's College, Oxford. The author is best known through his great treatise "A History of English Law," of which three volumes have been published since 1903.—Ed.]

2. For a summary account of the law officers see *Anson*, "The Crown," pt. 1, 207-8; for a detailed account of their modern position, duties, and privileges, see *G. S. Robertson*, "Civil Proceedings by and against the Crown," 9-16; for a specimen of the patents of the attorney and solicitor general and the summons of the attorney general to the House of Lords see appendix to this article.

I

The Process by which the Law Officers of the Crown Attained Their Modern Position

From the very earliest period in our legal history the king has appeared by his counsel in his courts.[3] In the thirteenth century these counsel were called by various names. There were "attornati regis," "narratores pro rege," men "qui sequuntur pro rege," and the king's serjeants.[4] At a time when the legal profession had hardly attained even the outlines of its final form we must not expect to find very much precision in the nomenclature of the officials who were appointed to appear for the king.[5] But in the fourteenth century some of these outlines were beginning to appear. The order of the serjeants was beginning to obtain its peculiar status and privileges and to become separated from the junior barristers and the attorneys.[6] The king therefore began to appear both by his serjeants, and by his attorney or attorneys. In the patents granted to these attorneys we can trace a gradual development of their office.

In the patents granted from the reign of Edward II to the reign of Edward III the powers of the attorney are limited either in respect of the courts in which he is to practice, or in respect of the area over which his authority extends, or in respect of the business with which he is entrusted. Let us look at one or two illustrations.

---

3. It is pointed out in *Finch*, "Law" (ed. 1759) 81, 82, that, "the king is always present in court; and that is the cause that the form of entry in all suits for the king is, *Henricus Hobart miles, attornatus domini regis generalis qui pro domino regi sequitur venit hic in curia etc.*, and doth not say, *Dominus rex per Henricum Hobart attornatum suum etc.* And therefore it is also that the king cannot be *nonsuit*, that all acts of Parliament which concern the king are general, and the court must take notice without pleading of them, for he is in all, and all have their part in him"; we shall see that some of these ideas have played their part in differentiating the king's attorney from the ordinary attorney, below, p. 404 seq.

4. See *Bellott*, "The Origin of the Attorney General," L. Q. R., XXV, 406-409. Apparently the earliest instance of the use of the term "Attornatus Regis" comes from 38 Hy. III.

5. I agree with Dr. Bellott, ibid., 409, that we can trace little difference between the persons called attornati regis in Edward I's reign and the persons classed by Dugdale as king's serjeants; but I do not altogether agree that the king's attorney never had "any connection with attorneyship in its narrower sense," ibid., 410, or that the "expression in its modern signification is an historical accident," ibid., 411—at any rate it is an accident which I think admits of explanation; see below, p. 403 seq.

6. *Holdsworth*, "Hist. Eng. Law," II, 407-26.

Limitation as to Courts

September 5th, 6 Edward II, the king appoints John de Norton his attorney for all his business in the King's Bench.[7] November 26th, 16 Edward II, he appoints Walter de Fyngale at a salary of £10 a year for his business in the Common Bench[8] And in this and the following reign there are many other examples of appointments limited to a particular court.[9]

Limitations as to Area

November 4th, 37 Edward III, we get an elaborate patent which appoints William de Nassefeldt the king's attorney with power to practice in all courts held in the counties of Yorkshire, Northumberland, Cumberland, and Westmoreland, as well within the liberties as without. The patent is remarkable in that it allows him to have a deputy, and specifies in great detail the particular business which he is to superintend.[10]

---

7. Pat. Roll, 6 Ed. II, pt. 1 (no. 138) m. 20—"Rex omnibus ad quos etc. salutem. Sciatis quod constituimus dilectum clericum nostroum Johannem de Norton attornatum nostrum ad negocia nos tangencia coram Justiciariis nostris ad placita coram nobis tenenda assignatis prosequenda et defendenda quamdiu nobis placuerit. Item quod idem Johannes officium illud habeat et teneat eodem modo quo alii attornati nostri officium predictum habuerunt temporibus retro-actis."

8. Pat. Roll, 16 Ed. II, pt. 1 (no. 157) m. 15—"De attornato Regis in communi Banco assignato. Rex dilecto sibi Galfrido de Fyngale, salutem. Sciatis quod assignavimus vos ad negocia nostra coram justiciariis nostris de Banco prosequenda et defendenda quamdiu nobis placuerit, volentes quod quamdiu officio illo intenderitis percipiatis in eodem per annum decem libras."

9. Pat. Roll, 1 Ed. III, pt. 1 (no. 166) m. 35—Alexander de Fyncham (K.B.); ibid., m. 28 (C.B.); ibid., m. 37—Alexander de Hadenham (C.B.); ibid., 12 Ed. III, pt. 2 (no. 193) m. 8—John de Clone (C.B.); ibid., m. 31—John de Lincoln (K.B.); ibid., 23 Ed. III, pt. 3 (no. 229) m. 34—Simon de Kegworth (K.B.); ibid., 34 Ed. III, pt. 1 (no. 259) m. 15—Richard de Fryseby (K.B.); ibid., 40 Ed. III, pt. 2 (no. 274) m. 12—Thomas de Shardelowe (K.B.).

10. Pat. Roll, 37 Ed. III, pt. 2 (no. 268) m. 25—"Rex universis et singulis Justiciariis vicecomitibus, Coronatoribus, Majoribus, Ballivis, Ministris et aliis fidelibus suis de Comitatibus Ebor., Northumbr., Cumb., et Westmorel., tam infra libertates quam extra ad quos etc. salutem. Sciatis quod nos de fidelitate et industria dilecti nobis Willelmi de Nassefelde plenissime confidentes, constituimus ipsum attornatum nostrum ad negocia nostra in quibuscumque Curiis et placeis in quibus negocia illa deducenda fuerint vel expedienda in Comitatibus predictis . . . prosequenda et defendenda, volentes quod idem Willelmus habeat per se et deputatum suum visum et copias quarumcumque inquisicionum, tam coram vicecomitibus . . . quam quibuscumque aliis ministris nostris . . . ex officio capiendarum, et eciam copias exigendarum . . . vicecomitibus liberandarum, dantes ei plenam tenore presencium potestatem inquirendi de tempore in tempus de catallis felonum et fugitivorum, ac utlagatorum, necnon de wrecco maris et de wayf et de piscibus regalibus quociens sibi melius viderit expedire, et nos inde in Cancellaria nostra certificandi, ac omnia alia quae pro commodo nostro in partibus illis faciendi viderit exequendi et explendi."

Limitations as to Business

May 20th, 41 Edward III, we get a patent to John de Asshewell giving him power to look into escheats, concealments, forfeitures, goods of felons, fugitives, and other profits of the Crown in London and the suburbs.[11]

In a patent dated July 13th, 9 Henry IV, we get for the first time a patent which gives to the attorney, Thomas Derham, the power to act for the king in the Common Bench "and all our other courts;"[12] and this becomes the general form.[13] In a patent directed to John Herbert, August 12th, 1 Edward IV, the powers of the attorney are still further extended. He is to act as the king's attorney in all courts in England, and in the courts of the counties of Carmarthen and Cardigan in South Wales, and he is to have the power to appoint a deputy or deputies.[14] This power of appointing deputies was recognized as an existing practice and elaborated in a patent to William Husee, dated February 14th, 11 Edward IV.[15] From that time onwards the form of commission is practically stereotyped.[16] The only difference is that, while before Henry

11. Ibid., 41 Ed. III, pt. 1 (no. 275) m. 20—"Rex omnibus etc. Sciatis quod assignavimus et deputavimus dilectum nobis Johannem de Asshewell attornatum nostrum ad negocia nostra tam de escaetis concelamentis forisfaturis catallis felonum et fugitivorum et aliis proficuis que ad nos pertinere potuerunt in Civitate nostra Londoniae et suburbiis ejusdem, quam de omnibus aliis ibidem unde processus per brevia nostra seu alio modo fieri contigerit prosequendis et defendendis et ad interessendum capcionibus omnium inquisicionum pro nobis sue nomine nostro in eisdem Civitate et suburbiis faciendas, et ad omnia alie facienda et exequenda quae pro nobis necessaria viderit vel opportuna quamdiu nostræ placuerit voluntati."

12. Ibid., 9 Hy. IV, pt. 2 (no. 379) m. 11—"Rex omnibus ad quos etc. Sciatis quod nos de fidelitate et circumspeccione dilecti nobis Thome Derham plenius confidentes ordinavimus et constituimus ipsum Thoman attornatum nostrum in communi Banco et in aliis curiis nostris habendum officium predictum quamdiu se bene gesserit in eodem percipiendum foeda eidem officio consueta."

13. Pat. Roll, 1 Hy. V, pt. 5 (no. 393) m. 30; ibid., 1 Hy. VI, pt. 1 (no. 407) m. 28; ibid., 8 Hy. VI, pt. 1 (no. 426) m. 19.

14. Ibid., 1 Ed. IV, pt. 3 (no. 494) m. 27—"In omnibus curiis nostris tam in Anglia quam in Wallia in Comitatibus Kermerdyn et Cardigan in Southwallia habendum et occupandum officium illud per se vel per sufficientem deputatum suum seu sufficientes deputatos suos pro termino vitae."

15. Ibid., 11 Ed. IV, pt. 2 (no. 528) m. 28—"Sciatis quod . . . ipsum (Husee) . . . assignavimus nostrum generalem attornatum in omnibus curiis nostris de recordo in regno nostro Angliae . . . Dedimus eciam et tenore presencium damus prefato Willelmo plenam potestatem et auctoritatem faciendi ordinandi et deputandi tales clericos et officiarios sub ipso in qualibus Curiis predictis quales aliquis alius officium illud habens sive occupans habuit fecit ordinavit et deputavit ac facere ordinare et deputare consuevit."

16. See ibid., 30 Hy. VI, pt. 2 (no. 475) m. 20; ibid., 1 Ed. V (no. 551) m. 4; ibid., 1 R. III, pt. 5 (no. 556) m. 4; ibid., 1 Hy. VII, pt. 1 (no. 561) m. 15; ibid., 1 Hy. VIII, pt. 1 (no. 610) m. 4; ibid., 6 Ed. VI, pt. 6 (no. 847) m. 13; 1 Mary, pt. 2 (no. 865) m. 45; 1 Eliz., pt. 4 (no. 941) m. 18 (15).

VIII's reign the attorney was as often as not appointed during good behavior or for life, in Henry VIII's reign and after he is always appointed during pleasure.

We may conclude from the evidence of these patents that during the Middle Ages the tendency has been to supersede several attorneys with limited powers by a single attorney with much wider powers, and to give this single attorney the power to appoint deputies; that this process is complete by the end of the fifteenth century, and that, as a result, the king's attorney has become in the sixteenth century the most important person in the legal department of the state and the chief representative of the crown in the courts.

These conclusions are corroborated by evidence from other sources.

In the fourteenth, and the beginning of the fifteenth centuries, it is clear from the Parliament rolls that the king still employed several attorneys. Thus in 1334 we have a reference in the Parliament rolls to the king's attorney in the Common Bench;[17] in 1363 to the king's attorney "or any one who sues for the king";[18] and in 1414 to the king's attorneys.[19] It is clear too that the serjeants and the attorney acted together for the king.[20] But later in the fifteenth century, it is usually the king's attorney who is referred to; and he is referred to together with the serjeants and the judges in such a way that it is clear that he is taking rank with them. Thus in 1432[21] and 1439[22] the judges of the two benches, the serjeants, and the king's attorney petition for payment of their salaries; and, though in many petitions relating to finance the king's attorneys are occasionally referred to,[23] in the great majority of cases it is the king's attorney.[24] Then too, in 1460, when the Duke of York had put forward his claim to the throne, not only the judges and the king's serjeants, but also the king's attorney were asked for their advice.[25]

17. Rot. Parl., II, 83b (8 Ed. III, no. 45).
18. Rot. Parl., II, 277a (37 Ed. III, no. 18).
19. Ibid., IV, 20b (2 Hy. V, no. 18).
20. Ibid., II, App. no. 74; IV, 19 (2 Hy. V, no. 12).
21. Ibid., IV, 394a (10 Hy. VI, no. 20).
22. Ibid., V, 13b, 14a (18 Hy. VI, no. 27).
23. Ibid., V, 40a (20 Hy. VI, no. 9); 136b (25 Hy. VI, no. 18); VI, 270a (1 Hy. VII).
24. See e. g. ibid., V, 139b (25 Hy. VI, no. 24); 143b (27 Hy. VI, no. 11); 176a (28 Hy. VI, no. 13); 214a (29 Hy. VI, no. 12); 219a (29 Hy. VI, no. 17); 247b (32 Hy. VI, no. 43); 473b, 528b (1 Ed. IV, no. 8); 517a (4 Ed. IV, no. 39); 616b (7, 8 Ed. IV, no. 12); VI, 102a (14 Ed. IV, no. 25); 132b (14 Ed. IV, no. 30); 395a (3 Hy. VII, no. 14); 502a (11 Hy. VII, no. 37); 523a (19 Hy. VII, no. 3).
25. Ibid., V, 376a (39 Hy. VI, no. 2)—"and then the seid Lordes consydering the answere of the seid Juges, and entendying to have the advice

These entries on the Parliament rolls show us that the attorney, like the judges and the serjeants, was consulted by the House of Lords. It is therefore probable that, from an early period, they were summoned by writs of attendance. In Henry VIII's reign the king's attorney is an important person in the House of Lords. In some of the very first entries on the journals of that house he is not only employed by it to take bills from the Lords to the Commons,[26] but also to amend bills and put them into shape.[27] All through the Tudor period it is the king's attorney who is usually consulted by the government on points of law; and it is he who conducts important state trials, not only in court, but also in their preliminary stages. We can see, for instance, that the work done by Coke and Bacon in the courts and out of the courts is in substance the same as that of a modern attorney general.

Let us now turn to the king's solicitor.

The patents do not give us very much information. The earliest patent that I have seen is of March 12th, 1 Edward IV; and the fact that no mention of the king's solicitor occurs on the Rolls of Parliament before that reign[28] makes it probable that the office dates from that reign. This patent is addressed to Richard Fowler, and states that the king has appointed him his solicitor "in all matters, pleas, suits, and quarrels affecting us within our realm of England," during good behavior.[29] Solicitors at that date were known to the legal world; and the general terms used in the patent obviously imply that Richard Fowler is to do for the king what an ordinary solicitor would do for his client. A patent of August 26th, 1 Richard III, shows that certain profits had already come to be

---

and good counseill of all the Kynges Counseillers, sent for all the Kynges Sergeauntes and Attourney."

26. Lords' Journals, I, 5b—"Decretum est per dominos quod in crastino, per Clericum Parliamente et Attornatum Regis ad Domum Communem, sive Inferiorem, portarentur Billa de ly Coroners etc."

27. Ibid, I, 4b—"Bill pro Reformacione Ecclesiastice Libertatis, *bis* lecta, tradita fuit Attornato et Sollicitatori Regiis reformanda et emendanda, et Billa de falsis Retornis, et Billa de Apparatu similiter"; and see a similar entry at p. 5b.

28. The first mention appears to be Rot. Parl., V, 530a (4 Ed. IV, no. 40), and is a proviso in favor of Richard Fowler.

29. Rot. Pat., 1 Ed. IV, pt. 2 (no. 493) m. 10—"Rex omnibus ad quos etc. Salutem. Sciatis quod nos de gratia nostra speciali ac pro bono et gratuito servicio quod dilectus serviens noster Ricardus Fowler nobis impendit et impendet in futurum, constituimus ipsum Ricardum Solicitarium nostrum de et in omnibus materiis placitis sectis et querelis nos infra regnum nostrum Angliae tangentibus seu spectantibus, habendum et occupandum officium predictum quamdiu se bene gesserit in eodem, habendum et percipiendum de nobis annuatim pro officio illo decem libras" etc.

annexed to the office; and not only gives a certain fee and these profits to the solicitor, Thomas Lynom, but also an allowance for costs and expenses[30]—a fact which makes it probable that the king's solicitor was expected to do the sort of informal work connected with litigation that fell to the lot of the private solicitor. Later patents do not differ in any very important points.[31] They often refer to the last preceding patent, or two or three patents, and state that the present grantee is to hold it as the preceding solicitors held it.[32] There is the same diversity of practice as to the tenure of the office as in the case of the attorney; but the practice of appointing the solicitor during good behavior appears to have lasted longer in the case of the solicitor than in the case of the attorney. It is not till after the restoration that he is appointed during the king's pleasure.[33]

It is clear from the journals of the House of Lords that at least as early as 1509 the king's solicitor occupied in Parliament the same position as the king's attorney.[34] Like him he was summoned by a writ of attendance.

If I am right in thinking that the king's solicitor bore much the same relation to the king's attorney as the private solicitor of the fifteenth century bore to the private attorney, it is not surprising to find that the office was from the first inferior to that of king's attorney, and soon came to be regarded as a stepping-stone to the latter office. If we look at the list of the law officers in Dugdale's Chronica Series we shall see that, from the date of the promotion of Christopher Hales from the post of king's solicitor to the post of king's attorney (1530), it becomes the general rule, on a change of law officers, to make the king's solicitor the king's attorney.[35]

30. Ibid., 1 Rich. III, pt. 5 (no. 556) m. 7—he is given a fee of £10 a year, "unacum omnibus aliis proficuis libertatibus juribus et commoditatibus eidem officio quoquomodo pertinentibus sive spectantibus. Aceciam nos grandes custas et expensas quos predictus Solicitarius noster in eodem officio et alias in servicio nostro sustinebit considerantes de uberiori gratia nostra concessimus eidem Thome annuitatem viginti libras" etc.

31. Rot. Pat., 1 Hy. VII, pt. 1 (no. 561) m. 3; 22 Hy. VII, pt. 3 (no. 603) m. 3 (24); 13 Hy. VIII, pt. 1 (no. 637) m. 11 (17); 25 Hy. VIII, pt. 1 (no. 666) m. 24 (23); 1 Eliz., pt. 3 (no. 940) m. 29 (10); 1 Charles I, pt. 24 (no. 2371) entry no. 4.

32. E. g. ibid., 1 Mary, pt. 2 (no. 865) m. 46; 6 Ed. VI, pt. 6 (no. 847) m. 13.

33. Appointment of Finch, Chancery Docquet Books (Crown office), VII, p. 2.

34. Lord's Journals, I, 4b, 5b, above, notes 26, 27.

35. In *Wilkes* v. the *King* (1768), Wilm. at pp. 229, 230, it is said, "The Solicitor General is the 'secundarius attornatus'; and as the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as standing in his place, when there is none. He

The names of the persons appointed attorneys and solicitors generally show us that, by the end of the sixteenth and the beginning of the seventeenth centuries, these offices had attained their modern importance in the state and in the law. In the Middle Ages there are very few of the king's attorneys who are known even to the legal historian;[36] and the same is true of many of the earlier solicitors. But from 1569 such men as Bromley, Popham, Egerton, Coke, Fleming, Hobart, Bacon, Yelverton, Coventry, Heath, Noy, Banks, Littleton, Heneage Finch, Francis North, and Somers held these offices. All these are names well known to the legal historian, and many are famous in the wider sphere of general history. In the Middle Ages the high road of preferment to the bench was by way of the degree of serjeant and the office of king's serjeant.[37] From the middle of the sixteenth century onwards the high road of preferment to the woolsack and the presidency of the courts of common law has been by way of the tenure of the offices of attorney and solicitor general.

The position of these legal advisers of the king and government has naturally been affected by constitutional changes in the state. The first modification of their position due to this cause naturally occurs at the latter part of the sixteenth and in the seventeenth centuries. It was at the latter part of the sixteenth century that the House of Commons began to assume a position of increased importance in the state. This brought forward the question of the relations of the attorney and solicitor general to that House. It was obviously desirable that the legal advisers of the government should be able to explain to the House the legal bearings of the government measures before it. But the law officers were attached to the House of Lords.[38] They had no direct connection with the House of Commons; and it might well have been questioned whether a person summoned to the House of Lords, though only by a writ of attendance, was capable of being a member of the House of

is a known and sworn officer of the Crown as much as the Attorney; and in the vacancy of that office, does every act, and executes every part of it;" and cp. *Rex* v. *Wilkes* (1770), 4 Burr. at p. 2554; it is clear that the Solicitor General had come to occupy this position by the end of the sixteenth century; in the journals of the House of Commons, Ap. 11th, 1614, it is said, "the Solicitor's place is but a limb of Mr. Attorney's."

36. In Edward I's reign, it is true, we get such names as Thornton, Inge, Lowther, and Mutford, whose names appear in the Y. BB., but we have seen that at this time the line between the king's serjeants and attorneys was not clearly drawn, above, p. 395 and n. 5; later attorneys, unless they became serjeants, e. g. Richard de Aldeburgh (1334), or had been serjeants, e. g. William de Thorpe (1343) and William Husee (1472), are unknown men.

37. *Holdsworth*, "Hist. of Eng. Law," II, 407-14.

38. Above p. 398 seq.; cp. D'Ewes Journal, 45, 47.

Commons. But in 1566, Richard Onslow, the Queen's solicitor, was elected a member of the House of Commons; and as the Crown desired that he should be made Speaker, the House decided that the fact that he was solicitor, and that he was summoned by writ of attendance to the House of Lords, was no bar to his capacity to serve as a member of the House of Commons;[39] and, having decided that he could so serve, they elected him Speaker.[40] In 1575 it was decided that a queen's serjeant, who was similarly summoned to the House of Lords by writ of attendance, could serve as a member of the House of Commons.[41] It might, therefore, have been supposed that the house would have no difficulty in applying the same rule to the attorney general, if and when the question arose. Apparently the question did not arise till 1606, when it was shelved.[42] It arose again in 1614; and, in spite of the practical identity of the position of the attorney with that of the solicitor and the king's serjeants, the illogical decision was arrived at to allow the present attorney to sit, but not to allow the attorney to sit for the future.[43] The Commons were jealous of the influence of the court; the court particularly wished Bacon, then attorney, to remain a member; and so an illogical compromise was arrived at.[44] This rule, though illogical, was followed for some time.[45] Francis North (1673) seems to have been the first attorney general to sit in the House of Commons;[46] and after the revolution the practice became general.

39. D'Ewes Journal, 121—"Sir Edward Rogers Knight, Comptroller of her Majesties Household, declared unto them, that forasmuch as Richard Onslow Esqr., her Majesties Solicitor-General, was a member of the said House . . . they would use some means to have him restored unto them (who as yet attended in the Upper House) to join with them in their election of a Speaker. And thereupon, notice thereof being given to the Lords of the Upper House . . . the said Mr. Onslow was sent down with the Queen's serjeant at law Mr. Carus and Mr. Attorney-General, to shew for himself, why he should not be a member of this House, who alledging many weighty reasons, as well for his Office of Sollicitor, as for his writ of attendance in the Upper House, was nevertheless adjudged to be a member of this House."

40. Ibid.

41. Ibid., 249.

42. Journals of the House of Commons, I, 323-4, Nov. 22, 1606.

43. Ibid., I, 459-60, April 11, 1614.

44. In the debate Sir R. Owen said, "that he hath received this morning advertisement from honorable persons why now [for] special cause he should serve; which not fit to be discovered here publickly, but will presently inform any man of that cause (for matter of state this Parliament) he should be, this Parliament, of the House, with an order that hereafter no Attorney General should at any time be of the House:" ibid., I, 459.

45. Ibid., Feb. 7 and 8, 1620; Feb. 9 and 10, 1625; Jan. 29, 1640, cited *Hatsell*, "Precedents," III, 18, 19.

46. "Lives of the Norths," I, 113-4; "His lordship sat in the House till he was made attorney-general; and then the same good friends began to discourse of his incapacity of sitting as a member of that House. . . . But the country party never ventured upon the point."

Pollexfen, William III's first attorney, was a member of the Convention Parliament; and both he and his successors, Treby and Somers, sat in the succeeding Parliaments without remark and without objection.

From the history of the relation of the attorney and solicitor general to the House of Commons it is clear that they had become such important officers of state that their position was necessarily affected by constitutional changes in the state. Modifications in their position, which have taken place in the succeeding centuries, have been due to these changes. Thus the changes involved in the growth of cabinet government have made them members of the ministry, and like other members of the ministry, dependent for their continuance in office upon the support of the House of Commons; and, in these last days, changes in the character of legislation, resulting from changed ideas as to the objects which the state should seek to attain, have made it necessary that the attorney general should be a member of the cabinet.

Such then in outline is the history of the process by which the law officers of the crown have attained their present position in the state. We must now turn to a more difficult question—Why did the king's attorney and solicitor attain their modern position during the latter part of the seventeenth century?

II

Why Did the King's Attorney and Solicitor Attain Their Modern Position during the Latter Part of the Seventeenth Century?

We may, perhaps, state the problem thus: How was it that the king came to appear in the courts, and to be advised on points of law by an attorney and a solicitor, at a time when the profession of attorney was becoming sharply divided from that of barrister, and at a time when a solicitor was approximating to an attorney, but was still regarded as inferior to him?

In order to solve this problem we must, in the first place, consider the very large differences between the development of the king's attorney and solicitor and the development of the ordinary attorney or solicitor; and, in the second place, the great increase both in the amount and the character of the demands made upon the king's legal advisers in the new age which opened in the sixteenth century. The solution of the problem will, I think, be found

partly in the results of the medieval development of the office of king's attorney, and partly in the new needs of the modern state.

In dealing with the king or with any of his officials we must always remember that "the king is praerogative"; but that in the Middle Ages the king's position and rights differed originally rather in degree than in kind from those of other men.[47] The position of the king's officers and the rules applicable to them will be of a type analogous to the similar officials employed by other men, and to the rules of law applicable to them at the time when these officials and these rules first originated. But there will be a difference, for "prerogative means exceptionality."[48] And this characteristic of exceptionality is present not only in the actual rules of law at any given period, but also, and to a far greater extent, in the historical development of those rules. The fact that an official or a rule of law is connected with the king will often cause the office or the rule to retain old ideas which elsewhere have long passed away.[49] The king is not affected by statutes unless they are specially made applicable to him; and his exalted position has often caused him and his officers to remain unaffected by the gradual changes and tendencies that affect common men. Thus, although in early days the king's officials and the law applicable to them are not so very different from the officials of, and the law applicable to, common men, they will both come, in the course of centuries, to be so different that it is difficult to see any resemblance whatsoever. The maintenance of old ideas, and the development, under the pressure of national necessities, of the differences between the rules applicable to the king's case and those applicable to the case of ordinary men, will produce a type of official and a body of law applicable to them, quite unlike anything else, and quite inexplicable without an historical analysis of the complex pressure of the old ideas and the new needs which have brought about the finished result.

Let us apply these principles to the problem in hand—the development of the position of the king's attorney and solicitor.

We hear of a king's attorney in the thirteenth century, that is at a time when the legal profession had not yet taken its final form. Like the attorneys of other people, he is often only appointed for a particular court;[50] like them he is sometimes formally

47. *P.* and *M.*, I, 496; cp. *Holdsworth*, "Hist. Eng. Law," Vol. III, 352-9.
48. *P.* and *M.*, I, 497.
49. For an illustration in another branch of law see *Holdsworth*, "Hist. Eng. Law," III, 311.
50. Above, note 9.

admitted by the court;[51] and like them he can both plead and take all the necessary steps in the action. But there are differences. The king could appoint an attorney general—an attorney to conduct any litigation that might arise—as he pleased, at a time when other persons could only do so by the express license of the king.[52] The king's attorney did not represent the king in his courts, for the king was always theoretically present, but he followed the case on his behalf.[53] He must see that the rights of his theoretically present but actually absent principal did not suffer; and the court must see that all the procedural advantages given to the king by his prerogative were given to his attorney. In the thirteenth and early fourteenth century, then, the king's attorney has all the powers and privileges of the attorneys of other men and more besides; for "the king is praerogative." And the consequences deduced from this fact developed with the development of the law—"in the pleadings and proceedings themselves of the king's suits," said Bacon in 1616, "what a garland of praerogatives doth the law put upon them."[54]

It is clear that the king's attorney will not be affected by the later changes in the position of the private attorney, statutory or otherwise, which came with the growth of the professional attorney. Even if he can be regarded as an officer of the court of King's Bench, he is an officer of a standing very different from that of the private attorney. He is associated with dignified officials, like the prothonotary or chief clerk of the crown, and not with the clerical staff of the courts.[55] He is not appointed by the court to which he is attached, nor is he subject to its discipline in the same way as the ordinary attorney. Like other attorneys he will have been educated at the Inns of Court; but, unlike them, he will generally have been called to the bar. Either by virtue of his powers as an attor-

51. Rot. Pat., 13 Ed. III, pt. 2 (no. 196) m. 24, after the patent making John de Clone, king's attorney in the Common Bench, there is a mandate to the Judges of the Common Bench to admit him.

52. *P.* and *M.*, I, 191, 192; cp. *Bellott*, L. Q. R. XXV, 402-404; it is an illustration of the way in which the law concerning the king and the royal family preserves archaic modes of thought that the queen and the Prince of Wales have attorneys general, *Robertson*, op. cit. 6, 7; and that the only other attorneys general are attached to the Duchy of Lancaster and the County Palatine of Durham—former franchise jurisdictions where similar archaisms might be expected to linger.

53. Above, n. 3.

54. The Case de Rege Inconsulto, "Works" (Ed. Spedding), VII, 693.

55. Roger North says, "Lives of the Norths," III, 138-9, "The attorney general of the King's Bench is an officer by the constitution, and hath a place under the Chief Justice when he sits, and puts on a round cap like the prothonotary and chief clerk of the crown;" but, he adds, "profit calls him away and to take the place of a pleader within the bar."

ney of the older type, or because he has been called to the bar, he can plead for the king; and he can do as well all that an ordinary attorney can do for his client.

At the same time, the differences which, from the outset, had existed between an attorney who appeared for the king, and an ordinary attorney, enabled his office to develop on its own lines. He could be a more general attorney than those of other men. He could be commissioned to appear not only in all cases affecting the king in any one court, but also in all cases in any court in England.[56] Thus it is possible for the king to appoint a single attorney who, together with the king's serjeants, is responsible for giving legal advice to the king; who, like them, is capable of appearing for the king in the courts. We have seen that by the end of the medieval period this official is on a level with the king's serjeants and the judges;[57] and like them he is summoned by writ of attendance to the House of Lords.[58]

The king's attorney of the thirteenth century bears a strong family likeness to the attorneys of other people. By the end of the fifteenth century the maintenance in his case of the old ideas connected with the office of attorney, the separate and distinct development of the ordinary attorney, and the development of the exceptional privileges of the attorney who appeared for the king, caused the king's attorney to become an official wholly different from the ordinary professional attorney, and thus gave to his office a wholly unique character.

We can see a similar development in the office of the king's solicitor. As in the case of the king's attorney, we cannot explain either the reason for his creation or his original position without a reference to the position of the ordinary solicitor. These solicitors were employed by private litigants in the fifteenth century. They were used to help the attorney, and to perform services that did not fall within the scope of the ordinary attorney's duty. Therefore they were in the nature of trusted servants of the litigant, or servants or clerks of the attorney. Now, although there was not the same set of limitations upon the sphere of action of the king's attorney that existed as to the professional attorney of the private person, it is clear that the king's attorney would often want assistance. It is significant that the time when the power to appoint a deputy becomes a usual clause in the attorney's patent, is the

56. Above, p. 397.
57. Above, p. 398 seq.
58. Above, p. 399.

time when the king's solicitor first appears.[59] However that may be, it seems to have been recognized from the first that the expedient of allowing the attorney to appoint deputies would not altogether meet the necessities of the case. Since the king had ceased to appoint several attorneys with co-ordinate powers, and had entrusted his business to a single attorney, it was probably thought desirable to appoint a person to act as a subordinate to the king's attorney. It was natural that he should take the title of solicitor, as the private solicitor of the period was often a person who acted as a subordinate to the attorney. From the first, therefore, the king's solicitor occupied the place which he occupies today; and, that being so, it was only natural that his office should develop rapidly in importance with the development of the office of king's attorney. That it was so developing at the very beginning of the sixteenth century is clear from the fact that in the earliest of the journals of the House of Lords (1509) we find that he is an assistant to that house, and that he occupies a position similar to that of the king's serjeants and attorney.[60]

That this is a correct explanation of the origin and development of the office of the king's solicitor is rendered probable by the fact that it has never had any peculiar connection with the court of chancery. The private solicitor in later days was peculiarly connected with that court. But that connection is caused by the fact that the development of the solicitor was largely due to the inadequate provision made both by that court, and by the Courts of Request and Star Chamber, for the representation of litigants, and the consequent employment by litigants of their own solicitors. The king's solicitor really represents the older class of solicitors—those employed by litigants or attorneys in the common law courts to help them in their business. Here again, therefore, a royal official preserves the memory of an older order. Here again the development of his office has resulted in giving to that office a wholly unique character.

At the beginning of the sixteenth century, therefore, both the king's attorney and the king's solicitor were important state officials. But they had not yet attained their modern position. They were not the only legal advisers of the crown. They were not the only persons employed by the crown to appear for him in the courts. Many of these duties were shared by the king's serjeants, who, like them, were summoned to the House of Lords, who, then and

59. Above, pp. 397, 399.
60. Above, p. 400.

later, took precedence of them. It is during the sixteenth century that they ousted the king's serjeants from their position of equality with themselves, and thus became pre-eminently the law officers of the crown.

By the beginning of the seventeenth century this development was practically complete. Hudson tells us that it was resolved in 1604 that the king's serjeant could not, like the king's attorney, proceed on his own motion by information in the Star Chamber.[61] He could apparently only act if he were specially instructed.[62] In other words, the attorney general was the only person who could take the initiative in legal proceedings on behalf of the crown. Why was it that he had thus been able to gain so decisive a superiority to the serjeants?

The short answer to this question is because the king's serjeants were serjeants. Because they were serjeants their sphere of action was not so wide as that which was open to the king's attorney or solicitor. Though they could and did appear in other courts, their main sphere of action was the common law courts, and their chief sphere of action was the Court of Common Pleas.[63] The king's attorney and solicitor could do all and more than all that a king's serjeant could do. They could even plead in the Court of Common Pleas when they appeared for the king.[64] They were therefore more useful to the king than any member of the order of serjeants could be in a century in which, because it was a century of change, men were required who could adapt themselves to new kinds of business. Again, because the king's serjeants were serjeants, their education and outlook were the education and outlook of common lawyers. As in the Middle Ages, it was the successful practitioners in the common law courts who became serjeants, and the successful serjeants who became king's serjeants.[65] But in this century the king required lawyers who were versed not only in the common

61. Star Chamber, 134—"In 1 and 2 Jac. it was resolved by the court, that it belonged to the place of the attorney [to inform for the king]; and *serjeant Heale*, the king's serjeant, putting in a bill against *Sir John Iuson*, was denied that privilege."

62. This was certainly the case later in the century; Roger North says, "Lives of the Norths," III, 138, "There used to be two serjeants, called the king's serjeants, for long time past, and these had a greater dignity and authority than the attorney general; they hold the precedence still, but have little authority and no business but as Mr. Attorney call them."

63. *Holdsworth*, "Hist. Eng. Law," II, 411-12.

64. "In the Common Pleas the attorney general may come into and sit in the court, and appear to speak in the king's business, for he hath power 'ad perdendum et lucrandum pro rege,' but he cannot take the place of a serjeant at the bar": "Lives of the Norths," III, 139.

65. *Holdsworth*, "Hist. Eng. Law," II, 407-8.

law, but also in the law administered in the courts outside the common law courts. He required also lawyers who were conversant with the political problems of the day. The need for lawyers who had had a political as well as a legal training grew greater as the contests of jurisdiction between rival courts grew fiercer, and as the constitutional differences between king and Parliament became more bitter. If the Stuart kings found it necessary to choose judges who would take their view of the constitutional questions of the day, much more did they find it necessary to choose legal advisers whose politics they could trust. But the serjeants, because they were pure Common lawyers, could not be trusted to see eye to eye with the king on many of these political questions. They were too well read in that medieval common law which taught that the law should be supreme in the state, and that Parliament had powers and privileges which could not be overridden.

The order of the serjeants was essentially medieval; and the king's serjeants were medieval officials. Like many other medieval officials, they were obliged to give place to officials who had originally occupied a humbler position, because these officials were, for that very reason, more capable of adaptation to the needs of the modern state. Thus the rise of the king's attorney and solicitor, at the expense of the king's serjeants, is, in the legal sphere, a phenomenon of the same kind as the rise, in the political sphere, of the king's secretaries, at the expense of many older medieval functionaries.

APPENDIX

Modern Patent of the Attorney General

GEORGE THE FIFTH BY THE GRACE OF GOD
of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith TO ALL TO WHOM these Presents shall come Greeting WHEREAS We did by Our Letters Patent under the Great Seal of Our said United Kingdom bearing date at Westminster the seventh day of October in the first year of Our Reign constitute and appoint Our right trusty and well-beloved Counsellor Sir Rufus Daniel Isaacs Knight Commander of Our Royal Victorian Order one of Our Counsel learned in the law to be Our Attorney General during Our pleasure NOW KNOW YE that We by these Presents Do revoke the said Letters Patent AND FURTHER KNOW YE that We of Our especial Grace DO CONSTITUTE AND APPOINT Our right trusty and well-beloved Counsellor SIR JOHN ALLSEBROOK SIMON Knight Commander of Our Royal Victorian Order one of Our Counsel learned in Law Our Solicitor General to be Our Attorney General during Our pleasure together

with all salaries fees authorities and advantages due and of right belonging thereto IN WITNESS Whereof We have caused these Our Letters to be made patent Witness Ourself at Westminster the twenty-first day of October in the fourth year of Our Reign.

BY THE KING HIMSELF.

MUIR MACKENZIE.

MODERN PATENT OF THE SOLICITOR GENERAL

GEORGE THE FIFTH BY THE GRACE OF GOD
of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To All Whom These Presents Shall Come Greeting Whereas His late Majesty King Edward the Seventh did by Letters Patent under the Great Seal of Our said United Kingdom bearing date at Westminster the ninth day of March in the tenth year of his reign constitute and appoint Our trusty and well-beloved Sir RUFUS DANIEL ISAACS Knight one of Our Counsel learned in the Law to be his Solicitor General during His pleasure NOW KNOW YE that We by these presents do revoke the said Letters Patent AND FURTHER KNOW YE that We of Our especial Grace Do constitute and appoint Our trusty and well-beloved JOHN ALLSEBROOK SIMON Esquire One of Our Counsel learned in the Law to be Our Solicitor General during Our pleasure together with all salaries fees authorities and advantages due and of right belonging thereto IN WITNESS Whereof We have caused these Our Letters to be made patent WITNESS Ourself at Westminster the seventh day of October in the first year of Our Reign.

BY THE KING HIMSELF.

MUIR MACKENZIE.

ATTORNEY GENERAL'S WRIT OF ATTENDANCE TO THE HOUSE OF LORDS

GEORGE THE FIFTH by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King Defender of the Faith To Our right trusty and well-beloved Counsellor Sir John Allsebrook Simon Knight Commander of Our Royal Victorian Order one of our Counsel learned in the Law Our Attorney General Greeting

WHEREAS Our Parliament for certain arduous and urgent affairs concerning us the State and Defence of our said United Kingdom and the Church was lately with the advice and consent of our Council summoned to be holden at our City of Westminster the thirty-first day of January in the first year of Our Reign which Parliament hath been from that time by several adjournments and prorogations adjourned prorogued and continued to and until the twenty-second day of December now next ensuing at Our City aforesaid to be then there holden and there with the Prelates Nobles and Peers of Our said United Kingdom to confer and treat We strictly enjoining command you that all other

things laid aside you be personally present at our said Parliament with Us and with others of Our Council to treat of the aforesaid affairs and to give your advice and this you may in no wise omit. Witness ourself at Westminster the twenty-first day of October in the fourth year of Our Reign.

MUIR MACKENZIE.

TO

Our right trusty and well-beloved Counsellor Sir John Allsebrook Simon Knight Commander of Our Royal Victorian Order one of Our Counsel learned in the Law. Attorney General.
A Writ of Attendance at Parliament.

MUIR MACKENZIE.

A TEXT OF Q. CERVIDIUS SCAEVOLA ON SALES MADE THROUGH THE AGENCY OF BANKERS

By Paul Huvelin[1]

The compilers of the Digest have inserted under the heading "De Solutionibus et Liberationibus" (46, 3) a text of Q. Cervidius

1. [Paul Huvelin was born in 1873. He studied in Paris at the College Stanislas, later at the Faculté de Droit, the Faculté des Lettres and the École des Hautes Études. Winner of the Concours Général of the Lycées and of the Concours of the Paris Faculté de Droit, he spent one year at the University of Berlin. In 1897 he became Docteur en Droit, presenting a thesis upon "L'Histoire des marchés et des foires," which obtained the Medal of Honor at the Paris Faculté de Droit. During 1898-1899 he was in charge of two courses on the history of law at the University of Aix-Marseille. In 1899 he got his teacher's degree at the Faculté de Droit of Lyons, and in 1903 became Professor of Roman Law at the same University. Since that time he has taught Roman law, but has also given an introductory course to the study of law, a course on comparative civil law, and on the history of French law. Beginning with 1910, he made several journeys to the Orient. On behalf of the French government he was charged with the mission of studying means of combating German intellectual propaganda in the Ottoman Empire. With this in view, he created at Beyrouth, Syria, two schools of university grade: of Law and of Engineering. These two schools, which opened at the end of 1913, were in a promising condition before the outbreak of the war.

M. Huvelin has directed his personal studies especially to the history of commercial law and the history of Roman law. To him, these represent two branches of the same subject, for contemporary commercial law is not of German origin—as certain German savants have attempted to demonstrate—but has sprung almost entirely from Roman institutions. This will be the dominating thought in the "History of Commercial Law," which he has long had in preparation, and which, but for the present war, would have appeared several years since. This history will be translated into English and form Vol. X of the Continental Law Series, edited by J. H. Wigmore. Up to the present the author has published, as preparatory works, his "Essai historique sur le droit des marchés et des foires," 1897; his "Histoire du droit commercial: état actuel des travaux et sources," 1903, and a great number of articles upon points of detail.

His principal works upon the Roman law are the following: "La notion de l'injuria dans le très ancien droit romain," 1903; "Les tablettes magiques et le droit romain," 1901; "L'Arbitrium liti aestimandae et les origines de la formule," 1907; "Stipulatio, stips, et sacramentum," 1907; "Études sur le furtum dans le très ancien droit romain," I, 1915; and many articles, reviews, and less important works.

He has endeavored in all his research to apply the sociologic and comparative method. Each volume of "L'Année Sociologique" (published by E. Durkheim) contains analyses or notes edited by him. We cite especially "Magie et droit individuel," 1897. Other works on the same order have also appeared: "La solidarité de la famille en Grèce et la méthode du droit comparé," 1908; "Individualisme et Socialisme," 1908, etc.

Finally, in addition to his strictly juridical writings, M. Huvelin has been induced to write historical essays, "Une guerre d'usure: la deuxième

Scaevola, which is of interest for the history of Roman bankers. This text is as follows:[2]

SCAEVOLA, "libro quinto digestorum": Filiae intestato patri heredis negotia mater gessit et res vendendas per argentarios dedit idque ipsum codice conscriptum est. Argentarii universum redactum venditionis solverunt et post solutionem novem fere annis, quidquid agendum erat, nomine pupillae mater egit eamque marito nuptum collocavit et res ei tradidit. Quaesitum est, an puella cum argentariis aliquam actionem habet, quando non ipsa stipulata sit pretium rerum, quae in venditionem[3] datae sunt, sed mater. Respondit, si de eo quaereretur, an iure ea solutione argentarii liberati essent, responderi iure liberatos. CLAUDIUS: Subest enim illa ex iurisdictione pendens quaestio, an pretia rerum, quae sciebant esse pupillae, bona fide solvisse videantur matri, quae ius administrationis non habebat. Ideoque si hoc sciebant, non liberantur, scilicet si mater solvendo non sit.

I

The "Digesta" of Scaevola form, as is known, a collection of "Responsa" delivered by the celebrated jurisconsult to clients who had consulted him on doubtful questions of law. The substance of the original work dates from that period of the reign of Marcus Aurelius included between the death of Lucius Verus and the accession of Commodus to the throne (169-177). But in all probability this material was not collected and published until after the death of the master, by his pupil, Claudius Tryphoninus, who added certain personal notes.[4]

Let us examine in the first place the fragment as it has come down to us.

---

guerre punique" (1917), and criticism of the arts: "Pour la musique française" (1916).—TRANSLATORS.]

[This translation (from the French) is by Leicester B. Holland, Esq., and Layton B. Register, Esq., of Philadelphia.—ED.]

2. Dig. 46, 3, fr. 88. *Lenel*, "Palingenesia iuris civilis," II, c. 220. Cf. Basil. 26, 5, fr. 88 (*Heimbach*, III, p. 124).

3. The Florentine MS. reads: "quae venditione datae sunt." I follow the Mommsen edition.

4. *Jörs*, V° Cervidius (*Pauly-Wissowa*, "Realencyclopädie der klassischen Altertumswissenschaft[2]," III, 1899), cc. 1988-1993; *P. Krüger*, "Geschichte der Quellen und Litteratur des römischen Rechts[2]," 1912, pp. 216-219; *Fitting*, "Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander[2]," 1908, pp. 63-68. In the opinion of *Samter* ("Das Verhältnis zwischen Scaevolas Digesten und Responsa," Zeitschrift der Savigny Stiftung, XXVII (1906) R. A., pp. 151-210), p. 200, our text contains, not a veritable consultation, but a note, in the form of a fictitious question, relating to a case of which Scaevola as a judge would have had knowledge. This hypothesis has found no echo. Cf. Zeitschr. d. Sav. Stiftung, loc. cit., p. 184, 1.

We find there, as Cujas[5] says, an "elegantissima species." A father dies intestate, leaving a single daughter, who has not yet attained the age of puberty. The mother administers the interests of the heir as "negotiorum gestor pro tutore,"[6] without, however, being "tutor," and consequently not possessing the "ius administrationis." In this capacity she entrusts certain goods from the estate of the deceased to bankers in order to have them sold,[7] and she fixes by stipulation the price to be received for them. This transaction is the object of certain writings ("idque ipsum codice conscriptum est"). The "argentarii" proceed with the sale and turn over to the mother the sums which they receive therefrom. For nine years more the mother continues to administer the interests of her daughter. Then she marries her and surrenders to her, on this occasion, what has been inherited from her father. But now the young woman finds the amount transferred rather small. Has the mother allowed herself to be duped? Have the bankers actually turned over all that they received? Or, indeed, has the mother herself dissipated or converted a portion of the values received? In any case, the daughter is anxious to know if she has an action against the "argentarii."

Scaevola answers by stating that the "argentarii" are without liability, but Tryphoninus in a note corrects this statement. He holds that a distinction should be made according as to whether the "argentarii" acted in bad faith or not in paying to the mother. If the "argentarii" acted in bad faith, they are held, provided that the mother is insolvent.

II

This fragment may be separated into four distinct parts.

First. An exposition of facts ("filiae intestato . . . . res ei tradidit") which at first sight seems fairly clear and sufficiently correct in form. Such clearness and correctness warrant us in regarding this exposition as, on the whole, the authentic work of Scaevola.

Second. A "quaestio" presented to the jurisconsult ("quaesitum est . . . . sed mater").

5. *Cujas*, "Comment in lib. II Respons. Papiniani", ad § "Quanquam" ("Opera," Neapoli, 1722, IV, cc. 879-880).

6. See the title of the Digest: "De eo qui pro tutore prove curatore negotia gessit" (Dig. 27, 5), and especially fr. 1 § 1 under this heading (*Ulpian*, Bk. XXXVI, "ad Edictum").

7. Let us note at the start that the text makes no mention of a sale at auction. The word "auctio" is nowhere used.

Third. A "responsum" by Scaevola ("respondit . . . . iure liberatos").

Fourth. A note by Tryphoninus ("subest enim . . . . solvendo non sit").

These last three parts seem at first sight obscure, complicated, contradictory, and only moderately correct. So obscure, so complex, so contradictory and so incorrect that one may well ask if they really came in this condition from the pens of the authors who are reputed to have written them. Our fragment has more than once been under suspicion of interpolation, but up to the present such suspicions have only attached to the note of Tryphoninus.[8] I hope to make plausible the hypothesis of more radical interpolations.

To begin with, the status given to the daughter and the mother is surprising. On two occasions the text designates the daughter as "pupilla." In addition, it specifies that the mother is one "quae ius administrationis non habebat;" which implies conversely that certain mothers do have the "ius administrationis," that is to say, may legally exercise the "tutela." Now it is known that during the Classic period the "tutela" is "officium virile."[9] As late as 224 a constitution of Alexander Severus declares "Tutelam administrare virile munus est et ultra sexum femineae infirmitatis tale officium est."[10] The first constitution admitting mothers to the "tutela" of their children dates from the year 390.[11] Tryphoninus, however, wrote at the beginning of the third century of our era; his "Digesta" date from the year 213 or the years immediately after.[12]

From this comparison of dates it is evident that in the time of Scaevola and even in that of Tryphoninus the co-contractants with the mother had no grounds for seeing in her a legal administrator. They could only consider her as a "negotiorum gestor" or as a "domina negotii." The word "pupillae" (on two occasions) and the words "quae ius administrationis non habebat" must therefore

8. *Pierre Favre* has admitted the interpolation of the words "scilicet si mater solvendo non sit" (*Petr. Faber*, Semestrium, Genevae, 1660, lib. II, cap. 5, pp. 241 et seq.); *Solazzi*, "Le azioni del pupillo e contro il pupillo per i negozi conclusi dal tutore" (Extr. from the Bulletino dell'Istituto di diritto romano, Roma, 1913), pp. 91-92, has admitted the interpolation of the whole of the note of Tryphoninus. *Kniep* alone, "Argentaria stipulatio" ("Festgabe der Juristenfakultät Jena für August Thon," Jena, 1911, pp. 1-62), pp. 37-38, has considered more extensive alterations.

9. *Gaius, Bk.* XII "ad Edict. prov."; Dig. 26, 1, fr. 16, 1 (where the word "plerumque" is interpolated); *Neratius*, Bk. III "regularum," Dig. 26, 1, fr. 18 (where the words "nisi a principe filiorum tutelam specialiter postulent" are interpolated).

10. Cod. Iust. 5, 35, const. 1.

11. Cod. Iust. 5, 35, const. 2 (Valentinian, Theodosius, and Arcadius).

12. *Fitting*, "Alter und Folge[2]," pp. 80-81.

have been interpolated. We can already revise the original text to the following extent:

. . . . nomine [filiae] (or [puellae]) mater egit . . . . an pretia rerum, quae sciebant esse [filiae] (or [puellae]) bona fide solvisse videantur matri.

III

A second series of difficulties arises from the lack of accord between the question asked and the answer attributed to Scaevola.

This lack of accord is counter to the habits of careful jurists of the Classic period. In their "responsa" they never depart from the terms of the "quaestio." They consider them to be unchangeable propositions, and neither enlarge them nor modify them. They are careful not to insert digressions. It has been pointed out that Scaevola is one of those who observes most rigorously this traditional method;[13] but here, by a surprising departure from his ordinary rule of conduct, he deliberately ignores it.

The question actually asked is the following: Has the daughter an action against the "argentarii" ("quaesitum est an puella cum argentariis aliquam actionem habet")? Upon this principal interrogation is grafted an unexpected clause—"quando non ipsa stipulata sit pretium . . . . sed mater."

Let us note, to begin with, that this clause is not at all in its logical place. It should more properly appear in the exposition of the case, and has the appearance of having been added here as an afterthought. However that may be, the intention seems to be to circumscribe and make more precise the difficulty confronting the consultant. This difficulty is hereby connected with the illegality of contracts for the benefit of third parties: the returns from the sale having been promised to the mother by the "argentarii," might the daughter in some way take advantage of this promise and employ the action "ex stipulatu"? But if we adopt this interpretation[14] we must notice a second disagreement between the clause "quando non ipsa . . . . " and the principal question: while the one considers only the action "ex stipulatu," the other considers any action whatsoever ("aliquam actionem"). For example the "rei

13. *P. Krüger*, "Quellen²," p. 217: "Er hält sich streng an die Anfrage;" and No. 37. Cf. *Schirmer*, "Replik in Sachen des linum testamenti incisum": Z. d. Sav. Stiftung, VIII (1887), R. A., pp. 101-102; and *P. Krüger*, "Bemerkungen zu der vorstehenden Replik," Ibid., p. 111, 3.

14. This interpretation—which is practically that of Solazzi, loc. cit., pp. 89-90—seems to me the only natural one. Cf. that of *Glück*, "Ausführliche Erläuterung der Pandekten," XXXII (1829), p. 328.

vindicatio." Thus the "quaestio" throughout is seriously lacking in internal harmony.

But let us pass over these first difficulties. We will immediately meet others even more embarrassing. We would expect Scaevola to formulate an answer adequate to the question. He ought to discuss the value of the stipulations made by the mother in the interests of her daughter, and conclude by denying or according to the latter the action "ex stipulatu." To the question "an puella . . . . aliquam actionem habet" he should propose a symmetrical negation or affirmation: "puella non habet (or "puella habet") actionem." But such is not the case. The jurisconsult deals only with the discharge of the bankers *with respect to the mother*; he considers whether by payment to her they have extinguished their obligation toward her, and he answers in the affirmative: "respondit . . . . iure liberatos." His decision, therefore, does not in any respect fit the terms of the "quaestio."

This disagreement shocks the most uncritical reader. For this reason the compiler of the text, foreseeing such an impression and wishing to mitigate it, has undertaken to insert between the two discordant clauses an appropriate transition. This is why we find there a sort of conditional and restrictive formula which is rather unexpected: "respondit—si de eo quaereretur, an iure ea solutione argentarii liberati essent." As a matter of fact the proposition "si de eo quaereretur . . . . liberati essent" constitutes a new "quaestio." And why this brutal contempt for the initial "quaestio"?[15] This dialogue at cross purposes between the consultant and the jurist recalls the old story of the tourist and the Auvergnat: "I should like a glass of water . . . . "—"If you are asking for wine, I haven't any wine."

To tell the truth, these internal contradictions have not escaped all the authors who have studied this text. Solazzi with his habitual perspicacity has pointed them out,[16] but he considers it sufficient explanation to suppose that Scaevola corrected in his "responsa" a "quaestio" which was clumsily presented by his client. The in-

15. Let us not say: "This is a custom of Scaevola's," nor quote, to prove it, two other "responsa" of the jurisconsult (Scaevola, Bk. III, "Respons."; Dig. 5, 2, fr. 13; and Bk. XVIII, "Digest."; Dig., 32, fr. 37, pr.): for the first of these texts is interpolated at the beginning of the decision. (See *P. Krueger*, Digesta,[12] p. 109, on this passage). In the other, Scaevola does not contradict the "quaestio" put to him, but merely assures himself that he is interpreting it correctly. Cf. *Samter*, "Das Verhältnis zwischen Scaevolas Digesten und Responsen": Z. d. Sav. Stiftung, XXVII (1906), R. A., p. 190.

16. *Solazzi*, loc. cit., p. 91.

experienced client gave evidence of too great simplicity, he thought, in asking whether the daughter had an action, for it was obvious that she had none. Neither an action "rei vindicatio" nor "ex stipulatu utilis" could be considered on her part. To be convinced of this it sufficed to run over the facts of the case. The daughter had no action "rei vindicatio", since the purchasers having bought the objects of the inheritance "sub hasta" under conditions necessarily implying good faith, and having possessed them for more than nine years, had incontestably acquired them by "usucapio." No more had she an action "ex stipulatu" since the "argentarii" debtors had duly paid what they owed into the hands of the mother, who alone was possessed of an "actio directa." So, according to Solazzi, Scaevola could ignore the idle question which was asked him. But, more courteous than an ill-mannered Celsus would have been under similar circumstances, he showed no annoyance. He simply reset the "quaestio" in a proper form before answering it.

In this explanation the ingenious finesse of Solazzi is apparent. But, nevertheless, we are not convinced. As a matter of fact, the "quaestio" is neither wholly vain nor altogether badly phrased. It presents a problem which does not appear altogether negligible, and the attribution of an action to the daughter might be seriously discussed. This is proved by the fact that it has actually been discussed, prior to Solazzi, with plausible arguments presented for and against it.[17] Solazzi himself only establishes what he calls self-evident by a considerable number of refinements and developments. It is evident that he considers these refinements and developments of value; why should Scaevola have shown himself less exigent?[18] Moreover, we might remark that sometimes these very developments go astray. The consultant specifies "quaesitum est an puella *cum argentariis* aliquam actionem habet," and Solazzi endeavors to demonstrate that the daughter has no action "rei vindicatio" *against the third party purchasers.* He does not consider the only hypothesis which would fit with the tenor of the "quaestio," that of an action "rei vindicatio" directed against the "argentarii" themselves. But is that possible? Would an action "rei vindicatio" be conceivable against defendants who were not possessors? Perhaps, on condition that these defendants have alienated in bad faith,

17. See for example *Glück,* "Erläuterung," loc. cit., pp. 332-333.

18. Kniep evidently shares my feeling, since he supposes that Scaevola had actually delivered an opinion upon the attribution of an action to the daughter. He might have written: "neque puellam neque matrem cum argentariis nullam actionem habere." But the compilers would have struck out this proposition. *Kniep,* "Argentaria stipulatio," p. 37.

and have thus placed themselves among the class of "ficti possessores," among those "qui dolo desierunt possidere."[19] Is such the case here? The text in its present state makes it difficult to answer, but the question is surely worth asking.

The explanation of Solazzi not only does not eliminate the anomaly of substance in the text, but also fails to take into consideration those of form. The latter are, however, striking. In good Latin we should read "quaesitum est, an puella . . . . *habeat*" (and not "habet"): the subjunctive is required in an indirect question. "Respondit . . . . responderi" is an amazingly clumsy repetition which never could be imputed to a classic author. The Florentine MS. gives "res quae *venditione* datae sunt" and the correction "in venditionem" has only the value of a conjecture by Mommsen.[20] Finally let us point out the use in two cases of the word "iure" joined to "liberari, liberatos," under such circumstances that, as frequently happens, the hands of compilers must be recognized.[21]

The conflict between the "quaestio" and the "responsum" forces us, therefore, to admit the rehandling of the passage. Scaevola might have written the "quaestio" *or* the "responsum," but he could not have written in its present form both the "quaestio" *and* the "responsum."

It remains to find out which of these two contradictory terms has been reshaped.

We answer, the "quaestio." It is the "quaestio" which has been altered by the compilers. The "responsum" has remained intact. In fact, after the elimination of the suspected sections, all that remains that is unattackable are the words "respondit . . . . liberatos." It was a question of discharge ("liberatio"), then, which Scaevola proposed and answered. Let us note, moreover, as confirmation, first that the compilers have inserted our fragment under the heading "de solutionibus et liberationibus";[22] second, that in his note Tryphoninus seems also to have been considering a question

19. And subject to the determination of whether the hypothesis is admissible for classic law, or only for Byzantine law. As is well known, it is still an open question to which epoch to attribute the first applications of the rule "Dolus pro possessione est" (*Lenel, Pernice, Siber, Kübler,* etc.).

20. For my own part I would prefer to read "res quae vendendae datae sunt." The mistake of the copyist would seem more admissible.

21. *Riccobono,* "Traditio ficta": Z. d. Sav. Stiftung, XXXIII (1912), R. A., p. 287 and 300; XXXIV (1913), A. A., pp. 224-230; "Dal diritto romano classico al diritto moderno," Palermo, 1917, p. 383.

22. And not under the heading "De obligationibus et actionibus" (Dig., 44, 7) as might have been supposed, if our text had been principally concerned with a question of stipulation for others.

of discharge, "si non sciebant, non liberantur . . . ." These considerations seem to me decisive.

Here, then, is one point settled. The original text of Scaevola in its essential tenor must have been constructed on the plan "quaesitum est an . . . . argentarii liberati sint.—Respondit eos . . . . liberatos." The remainder of the text between "quaesitum est" and "liberatos" comes from the interpolator. I particularly consider as a tribonianism the words "quando non ipsa stipulata sit pretium rerum, quae in venditionem datae sunt, sed mater." This tribonianism probably belongs, as I shall show, to the class of explanatory interpolations. Since the problem which originally confronted the consultant no longer existed in the time of Justinian, another one, rather foolish, and rather ill-fitted to the facts, was substituted for as much as it was worth.

IV

My thesis has a certain interest for the history of Roman banks. It is often stated that customers who conducted important sales by the intermediation of bankers were accustomed to have the amounts to be received from the purchasers promised to them by oral contracts.[23] I am readily willing to believe that such stipulations might prove useful in certain cases, but I certainly doubt whether they were habitual—and a fortiori, good practice—in all important sales. Otherwise we would have to suppose, which seems very improbable, that the bankers made no important sales for the account of absent persons. In any case this text which I consider interpolated is the only one cited to prove such a usage. The other evidences, which are sometimes added, have in reality no connection with the question. Such are notably: (1) A passage of the "lex metalli Vipascensis"[24] which mentions the "centesima argentariae stipulationis."[25] At the present day[26] it is proved that this "argen-

23. *Caillemer*, "Un commissaire-priseur à Pompei au temps de Néron." Nouv. revue hist. de droit, I, 1877, p. 402; *Mommsen*, "Die Pompeianischen Quittungstafeln," Hermes, XII, 1877, p. 99; *Leist*, V° "Auction," in *Pauly-Wissowa*, "Realencyclopädie²," II, 1896, c. 2271; *Kretschmar*, "Die Erfüllung," Leipzig, 1906, p. 12, n. 15: "Die bekannte römische Rechtssitte, für welche uns ein direkt einschlägiges Zeugnis in 1.88 D. de solut. 46.3, erhalten ist . . ."; *Platon*, "Les banquiers dans la législation de Justinien," Nouv. rev. hist., XXXIII, 1909, p. 138; *Kniep*, "Argentaria stipulatio," p. 44, etc.

24. C. I. L., II, 5181, 1. 1-10.

25. The passage is cited for example by *Karlowa*, "Römische Rechtsgeschichte," II, p. 26, 1; *Platon*, loc. cit., p. 139 et seq.

26. The proof is complete, whatever interpretation we may give to the words "Argentaria stipulatio." See on this question *Bruns*, Zeitschr. für Rechtsgeschichte, XIII (1878), p. 362; *Demelius*, ibid XVII (1883), p. 36; *Platon*, loc. cit., p. 143; *Kniep*, "Argentaria stipulatio," pp. 1-16.

taria stipulatio" was a stipulation whereby the banker directing a sale had the price to be paid to him promised by the purchasers.[27] In a general way in a "stipulatio argentaria" the "argentarius" plays the rôle of promisee, but in the stipulation which concerns us the "argentarius" would play the rôle of promisor. (2) Certain clauses in the tablets of the banker, L. Caecilius Jucundus, found at Pompeii.[28] But these clauses also refer to stipulations made between the banker and the purchasers.[29] From the existence of these stipulations to the existence of habitual stipulations binding the "argentarius" to the sellers, no legitimate conclusion can be drawn.

V

To render completely plausible the interpolation of the passage "an puella . . . . sed mater," some reason for it must still be found. What motive could have led the compilers to formulate a new "quaestio" entirely different from that of the original?

To make this motive clear, I must first justify the two following premises: (1) The compilers wished to use the authority of Scaevola to define the powers of the "negotiorum gestor" in matters of "solutio" and "liberatio." (2) But they could not use this authority as it stood because the problem there confronted no longer presented any interest for them.

If these premises are true, it can easily be understood why the text was retouched, and another problem more intelligible to the Byzantines substituted for the problem actually presented to Scaevola.

The first premise is demonstrated without difficulty, and the intention of the compilers appears evident. For our fragment 88 is placed under the title "De Solutionibus et Liberationibus" (Dig., 46, 3), following a series of fragments all devoted to the question of the liberative effect of payment made to an "extranea persona" or by an "extranea persona"; the fragment 86 (Paul, L.8 ad edict.) treats of payment made to the agent "ad litem"; the fragment 87

27. This is Kniep's interpretation. It is ingenious and alluring. The "argentaria stipulatio" would go back to the time when sale by simple mutual consent still lacked sanction, and when, consequently, the adjudication pronounced by the "praeco" in favor of the bidder was of no legal effect. The "argentarius" who presided at the auctions assured a contractual sanction for the sale by stipulating the amount of the price from the purchaser.

28. In this sense *Kretschmar*, p. 12; *Behrend*, "Beiträge zur Lehre von der Quittung," p. 2; *Zangemeister*, C. I. L., IV, Suppl. I; *Platon*, loc. cit., p. 146, 2.

29. In this sense *Mommsen*, "Pompeianische Quittungstafeln" 1° c°.

(Celsus, L.20 (27?) Dig.) of the payment made by a "procurator omnium rerum." In fragment 88 the question which interested the compilers was therefore the following: Does a "negotiorum gestor" who has become a creditor "ex re domini" liberate the debtor when he receives payment?

But the second proposition is more embarrassing. There is great difficulty in identifying the problem originally submitted to the consideration of Scaevola.

I return to the text of the "responsum," and I emphasize the expression "iure liberati, iure liberatos" which appears there on two occasions. These characteristic terms reveal an interpolation. I have called attention to this previously when applying the criterion of Riccobono. He has established the fact that compilers have struck out in classic texts all allusions to conditions of substance or form originally required for the validity of specific juridical acts when such conditions were no longer required in their time. They have substituted for them colorless and vague expressions such as "iure," "recte," "rite," etc. Scaevola certainly did not employ the words "iure liberati." He made use of precise terms specifying the conditions of a particular act of liberation. He must have had in view some formal mode of liberation which was consecrated by classic law and which had fallen into disuse in the later empire.

What could this mode of liberation have been?

We answer, the "acceptilatio litteris," that is to say the release effectuated by a writing on the codex of the debtor or of the creditor (or of the debtor *and* the creditor).[30]

This hypothesis finds a support in a rather enigmatic proposition in our fragment 88 which is hardly explicable without it. That is the proposition "idque ipsum codice conscriptum est." Let us analyze these words more attentively.

The mother has delivered the property of the daughter to the "argentarii" to have it sold, and this delivery[31] has been noted in a

30. I cannot be more precise, the written "acceptilatio" being, as is well known, very slightly understood.

31. "Idque ipsum" refers evidently to the words "res vendendae per argentarios dedit," and not to the phrase which precedes them ("filiae intestato patri heredis negotia mater gessit"). What was entered in a book was the delivery of the "res vendendae," but not the statement of the decease of the intestate father and of the "negotiorum gestio" of the mother. This interpretation is the only natural one from the grammatical viewpoint, and as far as I know all the writers have admitted it (Ex.: *Glück*, p. 327: "Die Argentarier trugen . . . *den Empfang und Erlös* in die Bücher ihrer Bank"). No one has ventured to suggest a second interpretation, from which it would result that the "argentarii" knew to whom the "res vendendae" belonged, and in what capacity the mother alienated them.

codex ("codice"). In what codex? At first sight this is not clear; therefore, this codex has been explained in the most diverse ways. Sometimes it has been taken[32] to mean any solemn act in writing. More often it has been taken to mean a book belonging to the banker who directed the sale, perhaps a sort of memorandum in which he had noted the orders for sales received,[33] or perhaps even a regular merchant's book of account.[34] Voigt with his customary boldness has considered that the order given was entered upon a "codex rationum mensae argentariae."[35] But whether we adopt the one or the other of these conjectures we are always confronted with the same objection. The writing of the contract entered into by the mother and the banker upon the book of the latter has no interest except as *proof* of this contract. But it should be well noted that in the following portions of our fragment the question of evidence is not discussed in any way. Neither Scaevola nor Tryphoninus breathes a word of it. What then would be the purpose of the reference "idque ipsum codice conscriptum est"?

I am convinced, consequently, that by these terms the original text referred to the codex of the mother, possibly it was even expressly mentioned, "idque ipsum (in) codice (matris) conscriptum est." We should understand by this the account book ("codex rationum," "liber rationum,"[36] "codex accepti et expensi")[37] which was kept by private individuals as well as by bankers,[38] and by women as well as by men.[39] The person who kept such a book entered there not only his receipts and expenses, but also the amount of debts owing to him and his own pecuniary obligations.[40] It would

32. *Platon*, p. 138. I believe, as will be seen further on, that this interpretation, inexact for the time of Scaevola, is quite that of the Byzantines.

33. *Kniep*, "Argentaria stipulatio," pp. 44 and 45.

34. *Glück*, "Erläuterung," p. 326, 68.

35. *Voigt*, "Ueber die Bankiers . . ." p. 535, 20.

36. *Voigt*, "Ueber die Bankiers . . ." pp. 531 et seq.

37. Voigt desires to distinguish this "codex rationum" from the "codex accepti et expensi." The distinction rests upon no evidence. Moreover, it is rejected at the present day: *Girard*, "Manuel de droit romain," 5th ed., p. 496, 3.

38. In the time of Scaevola, private parties kept such books. The proof is supplied especially by the following texts: Scaev., Bk. III "Resp.," Dig. 34, 3, fr. 31, 1; "Liberto ita legavit: 'Et si quid me vivo gessit, rationes ab eo exigi veto.' Quaeritur, an chartas, in quibus rationes conscriptae sunt, item reliquas secundum accepta et expensa heredibus reddere debeat;" Scaev., Bk. XXIV "Digest."; Dig. 40, 7, fr. 40, pr.; Bk. III "Resp."; Dig. 33, 8, fr. 26.

39. In this sense, see Scaev., Bk. XVII "Digest." Dig. 34, 1, fr. 15, 2. Cf., for a more ancient epoch, the anecdote of C. Visellius Varro and Otacilia Laterensis, reported by Valerius Maximus, 8, 2, 2.

40. *Voigt*, "Ueber die Bankiers," pp. 531-533. See for example Scaevola, Bk. III "Resp.," Dig. 33, 8, 26; "Titi fili, e medio praecipito sumito tibique habeto domum illam, itemque aureos centum": alio deinde capite peculia filiis praelegavit: Quaesitum est, an peculio praelegato et centum

be natural for the mother to enter upon her book her delivery of the "res vendendae" to the bankers, natural also for her to enter there the receipt of the sum which the bankers later turned over to her from the completed sale. And in such case the interest of these entries resides, not in the question of proof, but in the question of discharge, raised at the end of the original text.

For this reason I see in the words "idque ipsum codice conscriptum est" the remnants of a more elaborate development which defined the question of discharge submitted to Scaevola. The jurisconsult was asked, "Does the entry relative to the receipt of the price constitute a valid written release? Can the "argentarii" use it to claim their discharge?" But the primitive text has been shortened in its tenor. The very ambiguity of what remains and the surprising omission of the preposition "in," which a classic writer would have employed,[41] fully attest the amputation.

VI

Is there any way to restore the contents of the passage which has been thus abbreviated? Not in a precise and complete fashion: the text in its present condition furnishes no basis for such a restoration, but at least one may hazard conjectures.

The original tenor of the "quaestio" may be conceived a priori in two fashions.

First. Perhaps the consultant asked Scaevola if the "acceptilatio" was valid as such when the "acceptum" and the "expensum" did not relate to the same object: for example, when both did not refer to a "certa pecunia." Such, in fact, seems to be the case here. The "expensum" refers to the goods to be sold; the "acceptum" to the amount of a price of sale. The formal mode of release of debt which constitutes the "acceptilatio" would ill agree with this lack of concordance. And is it conceivable that other entries than those expressed in terms of money might be posted in a book of accounts?

---

aurei et usurae eorum debentur, *cum rationibus breviariis in aere alieno et sortem et usuras inter ceteros creditores complexus sit* . . . .

41. "Conscribere codice—instrumento" (in place of "in codice, in instrumento"), might relate to the Imperial chancellery. At any rate, a constitution of Antoninus Pius, in which is found the expression "promissio . . . instrumento conscripta" (Cod., 4, 32, Const. 1), is certainly interpolated: "Si interrogatione praecedente promissio usurarum recte facta probetur, *licet instrumento conscripta non sit*, tamen iure optimo debentur." In the classic period, the value of a stipulation would hardly be thought to depend on the drawing up of a written agreement.

Important as this question may appear, I do not think that it was submitted to Scaevola, for there remains no trace of any discussion on this point. This is not surprising. Nothing proves, indeed, that the "expensum" relating to "res vendendae" does not relate to a "certa pecunia." I would point out in this connection the technical expression "res vendendas *dedit* . . . . res quae in venditionem *datae sunt*." "Dare" in good juridical usage expresses transfer of ownership.[42] The bankers therefore became owners of the "res vendendae." I imagine that they only received them after evaluation and that the rule "aestimatio facit venditionem" applied here, the seller remaining a creditor, not for the "res vendendae" themselves, but for their value in money.

The objection will undoubtedly be made to this hypothesis that the "argentarii" selling at auction, received by this process sums which might vary within wide limits, and the amount of which could not be foreseen. Therefore of what use would it be to estimate at a "certa pecunia" the value of articles to be sold by their agency?

The answer is easy. Nothing indicates that our text refers to a public sale, still less to a sale at auction. The bankers might certainly act as agents for private sales. Not a word in our passage permits the assumption here of a public sale, and even if there were, there is none which permits the assumption of an "auctio." For every public sale is not an auction, that is to say, a sale to the highest bidder. Antiquity was acquainted with various forms of public sale, which as such were surrounded by special guaranties of publicity, but in which a fixed price was asked by the seller. This has been irrefutably proven for Hellenic sales ὑπό κήρυκος by M. Thalheim[43] and others,[44] and it is in no way improbable for Roman sales conducted by an "argentarius" and with the assistance of a "praeco."[45]

Moreover, it is possible that the "aestimatio" agreed upon between the mother and the bankers served as a sort of speculative contract. The "argentarii" would owe their principal the "aestimatio" fixed in advance, and not the variable price to be recovered

42. *Gaius*, 4, 4: ". . . cum scilicet id dari nobis intelligatur, quod ita datur, ut nostrum fiat."

43. *Thalheim*, V° "Auction," in *Pauly-Wissowa*, "Realencyclopädie der klassischen Altertumswissenschaft," II, cc. 2269-2270.

44. *E. Schulhof* and *P. Huvelin*: "Loi réglant la vente du bois et du charbon" (Fouilles de Délos, inscriptions: Bull. de corr. hellénique, XXXI (1907), pp. 46-93), p. 70.

45. These Roman sales certainly felt the influence of the Greek sales, ὑπό κήρυκος. But this would require a detailed demonstration.

from the sale. Thus they would assume for their own account the result of the operation, risks of loss or opportunities of gain. I find this hypothesis very alluring, for I believe that it is allied to certain practical combinations customary in Roman business life.[46] It is true that the text seems to reject it. Our fragment says that the bankers paid to the mother all that they recovered from the sale (". . . . universum redactum venditionis solverunt"). One would think that the purpose of these words was precisely to eliminate the idea of a speculative contract; but do these words belong to Scaevola? If the compilers actually wished to substitute payment for acceptilation in our fragment, they could hardly have made the substitution in any other place. I believe, indeed, that the original text must have mentioned an acceptilation here and not a payment.

Second. The tenor of the "quaestio" might be conceived in another fashion by supposing that the consultant asked Scaevola if a regular acceptilation producing the effects of a discharge could result from writings entered upon the account book of the mother. I am inclined to believe it was a question of this sort that the jurisconsult answered:

"Respondit eos . . . . iure (i.e. per acceptilationem) liberatos."

And in such case the answer is perfectly correct.

It is quite true that the mother, simple "negotiorum gestor," could not discharge the debtors of her daughter.[47] But the "argentarii" are not actually debtors of the daughter, they are debtors of the mother, since it is she who has given them the "res vendendae," and has entered this transaction on her "codex." The acceptilation made by the mother upon the same "codex" wholly discharges them, then: "Respondit eos . . . . liberatos." The daughter has no action except against her mother, nevertheless she is interested in knowing if the latter has not remained creditor of the "argentarii," since she could probably by an action "negotiorum gestorum" have

46. I recall especially: (1st) The method of the "in iure cessio hereditatis," by which an heir assigned a succession in toto, and for a speculative price, to a capitalist who doubtless made it his business to liquidate it and to sell it for his own profit; (2nd) The method of the "venditio bonorum," by which the creditors of a bankrupt sold the estates of the bankrupt, in return for a promise of a specified dividend, to a capitalist who made it his business to liquidate this estate for his own profit.

47. *Papin.*, Bk. II "Respons." Dig. 3, 5, fr. 30 (31) 6: ". . . nec ipsa . . . . debitorem accipiendo pecuniam liberat." *Solazzi*, loc. cit., pp. 90-91. *Cujas* (loc. cit., c. 879, bottom) is mistaken in thinking to find a contradiction between this evidence and our fragment 88 (46, 3). The one refers to the liberation, by the mother "negotiorum gestor," of the daughter's debtors; the other refers to the liberation by the mother of her own debtors.

claimed for herself the action which the mother might thus have retained. This assignment would have a great interest for her in case the mother were insolvent.

It should be noted that if the consultation should be restored to the field of "acceptilatio" it would there offer an interest which is quite lacking in that of "solutio," for the "acceptilatio," a formal mode of extinction of obligations, could produce its results aside from any payment. The mother could enter the result of the sale on her "acceptum" without having received it. It is true that the compilers have eliminated this hypothesis. But undoubtedly Scaevola considered it.

VII

But if the mention of the "codex" is to be explained as a vestige of a primitive text relating to a written "acceptilatio," an objection appears. The later empire no longer knew the written "acceptilatio," and private individuals then rarely kept regular "codices." Why, then, did not the compilers strike out all allusion to the "codex" in our fragment 88?

I might answer, if compelled to do so, that they committed one of their customary oversights; but I believe rather that they had a definite design, which can be recognized in the singular shortening of the residual text which we possess. I have admitted that they wrote "idque ipsum codice conscriptum est" where Scaevola must have written "idque ipsum (in) codice (matris) conscriptum est." They indicated thus their intention of assigning to the word "codex" a broad meaning, doubtless taking it in the sense usual to the Byzantines of a solemn written act. Their aim in proceeding thus would be evident. They wished to prepare the way for the interpolation further on of the words "quando non ipsa stipulata sit pretium rerum, quae in venditionem datae sunt, sed mater." Indeed, this "stipulatio" between the mother and the "argentarii," whose existence was assumed, would have to be related to something in the exposition of the facts. They related it to the "codex," that is to say, to the previously mentioned written act, for the "stipulatio" in the time of Justinian is viewed essentially as a written act.[48] Either "codex" or "stipulatio" might apply to a receipt for "res vendendae" delivered by the bankers to their client, and carrying a

48. *Mitteis*, "Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs," 1891, pp. 485 and 599. *Collinet*, "Études historiques sur le droit de Justinien," I, 1912, p. 67.

promise explicit or implicit to pay the product of the sale into her hands.

VIII

The note of Tryphoninus, to which I now come, has already caused much ink to flow. At first sight it appears the most questionable part of the fragment. At every turn difficulties arise. The following are the most striking:

First. "Enim." Tryphoninus criticizes and corrects, in spite of all that has been said,[49] the system of his master, since at last analysis he arrives at a "non liberantur" in opposition to the "respondit . . . . liberatos" of Scaevola. Now the conjunction "enim" which leads up to this criticism (—"subest enim . . . . illa quaestio") is a causal conjunction, signifying "for as has been shown." It hardly seems in its place, since it should prelude a development or an interpretation of what goes before. This anomaly suggests a rehandling. Kniep has thought it possible to evade the difficulty by supposing that the compilers made an excision at the beginning of the note.[50] Therefore he restores before "subest enim" the words "dubitari potest." Let us remark, however, that this restoration can only be justified if the rest of the passage seems irreproachable. Let us see if this is the case.

Second. "Subest . . . . illa ex iurisdictione pendens quaestio an . . . ." What does Tryphoninus mean by that? Apparently the following: The system of Scaevola remains subordinated in its application to the examination of a question of fact, the question of the good or bad intent of the "argentarii." This is a question "ex iurisdictione," that is to say, it belongs, according to the historical epochs, to the decision of the magistrate or the judge. Let me explain myself. If the world "iurisdictio" is actually attributable to Tryphoninus, it is to be understood in its classic sense and designates the "iurisdictio" of the "praetor." The expression "ex iurisdictione pendens quaestio" is applied then to a question submitted to the "praetor" in order that he may grant or refuse thereafter an action "cognita causa."[51] This interpretation,

49. In the opinion of *Pothier* ("Pandectae Justinianeae in novum ordinem digestae," 4th ed. (Latruffe), Paris, 1821, t. III, p. 270, under lib. 46, 3, 2nd part., 1st sect., art. 3, note 6), Tryphoninus merely confirmed the distinction "Si de eo quaereretur . . ." inserted in the "responsum." Similarly, *Glück*, loc. cit., p. 330. It is clear, however, that Scaevola declared the bankers liberated *in any case*, while Tryphoninus declared them liberated *only when they acted in good faith*. It is an extraordinary confirmation that demolishes one-half of the original!

50. *Kniep*, "Argentaria stipulatio," p. 37.

51. In this sense, *Kniep*, p. 38.

plausible in itself, seems, however, to be contradicted by the conclusions to which it leads. Tryphoninus as well as Scaevola is confronted, as we have seen, by a question of discharge. Now, questions of discharge are tried "in iudicio," whether they operate "ipso iure" or "exceptionis ope": the "iudex" alone judges the facts of the defense presented. There is no method of discharge which is tried "in iure," and a refusal of action is never called "act of discharge."

This observation leads me to the following dilemma. Either the word "iurisdictio" comes from the compilers, or the words "non liberantur" are not to be understood in their proper technical acceptation.

At first one is inclined to attribute the proposition "subest illa ex iurisdictione pendens quaestio" to the compilers. This phraseology, which is difficult to understand, and which certain interpreters, indeed, have not understood,[52] seems smirched with Byzantinism. Since the Byzantines no longer were acquainted with the distinction between "ius" and "iudicium," the word "iurisdictio" from their pens would designate the power of examination by the judge. Consequently the words "non liberantur" would no longer contain anything discordant. The proposition "subest illa ex iurisdictione pendens quaestio" might pass for an interpolation.[53]

But a more attentive examination shows the hypothesis to be ill-founded. The comparative study of certain texts establishes that the expression "quaestio ex iurisdictione pendens"[54] was employed in classical language. Gaius in his "Institutes" speaks, for example, of "actiones quae ex propria (praetoris) iurisdictione pendent." Now the "Institutes" of Gaius have apparently escaped[55] any suspicion of interpolation, at least at the hands of the Byzantines. I see no reason then to take away from Scaevola the suspected

52. So *Fern. de Retes*, "Opusc.," Vol. IV, "ad h. legem" (*Meerman*, "Thesaurus," VI, p. 220): he gives to "iurisdictio" the unusual sense of "responsum," and translates "Subest illa ex iurisdictione pendens quaestio" in the following terms: "This question rests dependent upon the 'iurisdictio' above" (i.e., upon the "responsum" previously made by Scaevola).

53. *Cujas* (loc. cit., c. 880), and *Glück* ("Erläuterung," p. 330), admits that our text considers, under the name of "iurisdictio," the examining power of the judge. "Illa quaestio," says Cujas, "quae pendet ex iurisdictione, *hoc est, quae officio iudicis dirimenda est*"; but this illustrious jurisconsult does not definitely assume interpolation of the proposition—"Subest enim illa pendens ex iurisdictione quaestio."

54. *Gaius*, "Inst." 4, 110: "Quo loco admonendi sumus eas quidem actiones quae ex lege senatusve consultis proficiscuntur, perpetuo solere praetorem accommodare, *eas vero quae ex propria eius iurisdictione pendent*, plerumque intra annum dare."

55. For it is scarcely necessary to refute the presumptuous imaginings of Beseler: his own compatriots have attended to this.

proposition. It only remains to be seen, therefore, if "non liberantur" should not be understood in a sense outside of the technical acceptation.

IX

According to Tryphoninus, the "argentarii" remain bound ("non liberantur") at least in certain cases which are difficult to specify. But bound to whom?

At first sight it seems that it would be to the mother alone, since they dealt with her alone, and had never owed anything to the daughter. On reflection, however, it may be recognized that they might be bound to the daughter. The existence of a direct obligation between the "argentarii" and the daughter rests on that part of the text which raises the question of their good faith. This direct obligation, the outcome of bad faith, can be considered in two ways: Either as an obligation sanctioned by the action "de dolo" or as an obligation sanctioned by action based on the "fraus creditorum."

First. Solazzi has considered an action "de dolo." The "argentarii," if they knew that the objects sold belonged to the daughter, committed a dolus toward her by paying the price thereof to the mother: whence the attribution of an action "de dolo" to the victim of this dolus.[56] This hypothesis seems to me disproved by the very terms employed in our passage, "non liberantur." The dolus committed at the moment of payment would give rise to a new obligation, beginning at that moment; but it would not perpetuate a preexisting obligation. Therefore one would not say "non liberantur." The question considered would deal with the rise and not with the perpetuation of an obligation.

Second. Others have considered a legal measure based upon the "fraus creditorum" (actio Pauliana," or rather "interdictum fraudatorium.") Among these is Pothier.[57] In his "Pandectae Justinianeae,"[58] in commenting on the words of our fragment, "scilicet si mater solvendo non sit," this author has: "hoc enim solo casu quo gestor solvendo non esset, solventes ei non liberantur, quia hoc solo casu decipiendi pupilli consilium participant." Acordingly for him, if the "argentarii" are held, it is as participants of a "fraus"

56. *Glück* ("Erläuterung," p. 333) had already grasped this idea: *Solazzi*, loc. cit., resumed and perfected it.

57. My learned colleague and friend, Ch. Appleton, kindly brings this to my attention.

58. *Pothier*, "Pandectae Justinianeae," loc. cit., n. 7.

committed at the expense of the daughter. Let us see in what manner Tryphoninus could conceive this "fraus."

He might impute it to the mother. But how? Certainly not because she had alienated the "res vendendae" (since these "res vendendae" did not form part of her patrimony and consequently were not part of the security of her creditors). Neither could it be because she had received payment of sums for which she was in fact a creditor (since every "fraus" involves an impoverishment),[59] but rather it was because she had released her own debtors, the "argentarii," in fraud of the rights of her daughter, her creditor "ex negotiis gestis." Ulpian, indeed, when commenting on the terms of the edict "quae fraudationis causa gesta erunt," affirms: "quodcumque igitur fraudis causa factum est, videtur his verbis revocari, qualecumque fuerit: nam late ista verba patent. Sive ergo rem alienavit, sive acceptilatione vel pacto aliquem liberavit." The "argentarii" discharged by the mother exposed themselves therefore to an action in fraud. But for that it is necessary that they should be "conscii fraudis," that is to say, that they should know that the mother is insolvent, or that she becomes so by their discharge.

This explanation has the advantage of taking into consideration the two indications contained in the text. The one relative to the power of decision which would belong in this manner to the "praetor" (". . . . quaestio ex iurisdictione pendens"),[60] the other relative to the necessary insolvency on the part of the mother, in order that the "argentarii" might be prosecuted (". . . . si mater solvendo non sit").[61]

One objection remains, springing, like the preceding, from the words "non liberantur." Do not these words set aside the hypothesis of an action in fraud, as they set aside that of an action "de dolo"?

---

59. *Ulpian.*, Bk. LXVI "ad edict." Dig. 42, 8, fr. 6: "Apud Labeonem scriptum est eum, qui suum recipiat, nullam videre fraudem facere, [hoc est eum, qui quod sibi debetur receperat: eum enim, quem praeses invitum solvere cogat, impune non solvere iniquum esse]." The words within brackets are interpolated, as *Solazzi* has demonstrated, Bull. Ist. Dir. romano, XV (1903).

60. Cf. Dig. 42, 8, fr. 10, pr.: "Interdum *causa cognita* et si scientia non sit . . ." The "interdictum fraudatorium" is given only "cognita causa."

61. These words appear to be appropriate to the essentials of an action in fraud. But while they are admissible in substance, they still remain very much under suspicion in form. I would be quite willing to believe that Tryphoninus had considered it useless to specify the insolvency of the mother. The words "scilicet si mater solvendo non sit" would then constitute one of these explanatory interpolations familiar to the compilers. In my opinion, M. *Lenel* is wrong ("Palingenesia," II, c. 220) in rejecting here, for reasons of substance, the idea of an interpolation: in the matter of interpolations, criteria of form take precedence on criteria of substance.

Because the "fraus" gives rise to a new penal obligation, and does not in any way perpetuate a pre-existing obligation.

This would indeed be decisive if the terminology relative to the penalties of the "fraus creditorum" had always preserved its original force. But such is not at all the case. As a matter of fact this terminology is the result of evolution. The criminal sanction for the "fraus" assumed progressively a restitutive character, and there are numerous texts which, in order to define the effects of this sanction, no longer speak of re-establishment alone, but also of the maintenance of the juridical situation, prior to the "fraus." I will cite only the text of Ulpian,[62] ". . . . ut perinde omnia revocentur, ac si liberatio facta non esset."

My conclusion is that the words "subest illa ex iurisdictione pendens quaestio" may belong to Tryphoninus. They allude to the pretorian "causae cognitio" whereby a prosecution for "fraus creditorum" would be instituted against the "argentarii."

X

But other difficulties arise from what follows. Indications of rehandling appear in the pronouncement "an pretia rerum, quae sciebant esse pupillae, bona fide solvisse videantur matri, quae ius administrationis non habebat." Let us point out "pretia" instead of "pretium" (an abnormal plural[63] which recalls other analogous plurals used by the Byzantines: pecuniae,[64] thesauri,[65] etc.); "sciebant" instead of "scirent," and "habebat" instead of "haberet" (these verbs in subordinate clauses in indirect discourse should be put in the subjunctive); the mention of the "pupilla" and of the "ius administrationis," which are foreign to classic thought; finally the contradiction between the hypothesis "quae sciebant esse pupillae" and the question "an bona fide solvisse videantur" (how could the "argentarii" act in good faith if they knew that the "res vendendae" belonged to the daughter, considering moreover that in the time of

62. Dig. 42, 8, fr. 10, 22. See also fr. 10, 14; fr. 14 pr., fr. 17, pr. etc.

63. One might venture to justify this plural by comparing it with certain others, such as fr. 33, pr. (Dig. 9, 2) and fr. 63, pr. (Dig. 35, 2). But let us note that, in these other cases, the plural "pretia" takes on an abstract meaning: it designates not the *selling price* of concrete things, but the *values* of the things, regarded in the abstract: "Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur."

64. *Mancaleoni*, "Contributo allo studio delle interpolazioni" (Il Filangieri, 1901).

65. *P. Huvelin*, "Études sur le 'furtum' dans le très ancien droit romain," I, 1915, p. 278.

Tryphoninus the mother could never have the "ius administrationis"?)

This whole passage, then, has undergone important alterations.

But what alterations? Let us take as a starting point the idea advanced above: Tryphoninus contemplated an "interdictum fraudatorium" or an "actio Pauliana." Let us consider what, according to our passage, would constitute the fraudulent act. It would consist of a payment made by the "argentarii" and received by the mother. Now this would be altogether abnormal. I have already pointed out that the creditor who receives payment from his debtor does not commit a "fraus"; a debtor who pays his creditor does not become an accomplice in "fraus." The only acts of discharge which could constitute a "fraus" are those which operate without payment or equivalent satisfaction. Ulpian cites only among the acts of discharge susceptible of falling under the weight of the "interdictum fraudatorium" the "acceptilatio" and an informal agreement of release ("pactum de non petendo").[66] I am thus brought back to the idea of an "acceptilatio." This second indication confirms the first. Tryphoninus, like Scaevola, must have dealt with an acceptilation and not a payment. He must have asked himself "an pretio rerum bona fide per acceptilationem videantur a matre liberari . . . ."

The compilers having stricken out all allusion to a release have retouched the phrase, not without coating it, as was their habit, with inaccuracies. They have thus adapted it to the consideration of a new problem: that of the respective powers of the "negotiorum gestor" and of the "tutor" in questions of payment, and of the effects of payments received by them for the account of the "dominus" or the "pupilla."

The second phrase attributed to Tryphoninus commences by an "ideoque" which is a perpetual shock. This word, as Solazzi has correctly remarked,[67] should announce the conclusion of a controversy about "rationes decidendi." It is out of place after a passage pronouncing only a question and a "ratio dubitandi." Doubtless it must be attributed to a clumsiness on the part of the compilers.

XI

The best method of summing up the study which precedes is to attempt to reconstruct the original text of Scaevola and Try-

66. *Ulpian.*, Bk. LXVI "ad Edict." Dig. 42, 8, fr. 1, 2.
67. *Solazzi*, "Le azioni del pupillo . . .," p. 91.

phoninus. Naturally such a reconstruction can only be approximate, and leaves the greatest latitude for conjecture in matters of detail. With these reservations made, I propose the following:

SCAEVOLA, "libro quinto digestorum." Filiae intestato patri heredis negotia mater gessit et res vendendas per argentarios dedit idque ipsum (in) codice (matris) conscriptum est. Argentarii(s) accepto factum est [. . . .]; et post (acceptilationem) novem fere annis, quidquid agendum erat, nomine (puellae) mater egit, eamque marito nuptum collocavit, et res ei tradidit.

Quaesitum est, an [. . . .] (per acceptilationem) argentarii liberati sint, quando non ipsa puella accepto fecerit pretium rerum, quae (vendendae) datae sint, sed mater.

Respondit eos liberatos.

CLAUDIUS (Dubitari potest). Subest enim illa ex iurisdictione pendens quaestio, an pretio rerum bona fide videantur a matre liberari. Quas si sciebant esse puellae, non liberantur.

PART X

PRIVATE LAW

CONSIDERATION IN EQUITY

By Roscoe Pound[1]

I

In 1835 Sir Edward Sugden decreed specific performance of a post-nuptial agreement whereby a father undertook to make provision for his child by way of marriage settlement, although there was no common-law consideration and the agreement was not in the form of a covenant to stand seized.[2] As late as 1841 it was possible for able counsel to argue in the court of chancery that "a voluntary settlement, although void against a subsequent purchaser, was good as between the parties,"[3] and there was abundant authority to sustain the proposition.[4] In the older cases, even when the court did not go

1. [Born Oct. 27, 1870, at Lincoln, Neb.; A. B., University of Nebraska, 1888, A.M., 1889, Ph. D., 1897; LL. D., University of Michigan, 1913; practiced at Lincoln, Neb., 1890-1901, 1903-7; Commissioner of Appeals, Supreme Court of Nebraska, 1901-03; Assistant Professor of Law, 1899-1903, Dean, Law School, 1903-7, University of Nebraska; Professor of Law, Northwestern University, 1907-9; Editor-in-Chief, Illinois Law Review, 1907-9; Professor of Law, Chicago University, 1909-10; President, Association of American Law Schools, 1911-12; Story Professor of Law, 1910-13, Carter Professor of Jurisprudence, 1913—, 1916—Dean, Law School, Harvard University. Among his published works are: "Readings on the History and System of the Common Law," 1904, 2d ed., 1913; "Readings on Roman Law," 1906, 2d ed., 1915; and numerous articles on jurisprudence, Roman law, and dogmatic law in the leading American and European law journals.—ED.]

2. *Ellis* v. *Nimmo*, Lloyd & Goold, temp. Sugden, 333. The chancellor put it as a question "whether an agreement for a *meritorious* consideration, resting in fieri, is such a contract as a court of equity will enforce" (p. 345), and came to this conclusion: "I have before me a contract which I am bound to enforce if there is a sufficient consideration. The consideration is such as to enable the court to remedy even a defective settlement where there is no contract. I think it a fortiori sufficient to sustain an actual contract, and I shall therefore decree specific performance of the agreement" (p. 349).

3. *Jeffreys* v. *Jeffreys*, Cr. & P. 138, 139.

4. "It is clear that a voluntary settlement is good as between the parties": Lord Eldon in *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84, 90 (1811). "For an agreement, though voluntary, under hand and seal, ought to be decreed by this court": Trevor, M. R., in *Beard* v. *Nutthall*, 1 Vern. 427, 428 (1686). "I take it to be clear that if I voluntarily and without any consideration covenant to lay out money in a purchase of land to be settled on me and my heirs, this court will compel the execution of such contract tho' merely voluntary": Lord Macclesfield in *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171, 176 (1723). See also Lord King in *Randal* v. *Randal*, 2 P. Wms. 465, 467 and cases cited.

so far, it by no means required a common-law consideration.[5] In 1841 Lord Cottenham definitely laid it down that "the court will not execute a voluntary contract" and that "the principle of the court to withhold its assistance from a volunteer applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement."[6]

Since *Jeffreys* v. *Jeffreys,* Lord Cottenham's statement has been accepted as the pronouncement of a general rule. But it has not been certain just what promises courts of equity regard as "voluntary" in this connection, nor how far there were not exceptions. Starting with the proposition that equity will not aid a volunteer and assuming it to mean that it will only act where there is a common-law consideration, we must admit, as the authorities go, at least six anomalous cases in which the proposition does not apply or is not wholly true.

These are:

(1) A gratuitous declaration of trust without transmutation of possession;

(2) A covenant to hold real property in trust for another in "consideration" of natural love and affection;

(3) Cases of executory gift which the courts torture into cases of contract in order to enforce the gift;

(4) Parol gifts of land where the donee takes possession and acts upon the gift;

(5) Defective conveyances to a creditor by way of security, to a wife by way of settlement, or to a child by way of advancement, where there was no legal duty but on the basis of the moral duty equity gives reformation under circumstances amounting to specific performance of the promise; and

(6) Options under seal.

It will be worth while to examine each of these more closely.

5. Thus Lord Henley said in *Wycherley* v. *Wycherley,* 2 Eden 175, 177-8 (1763): "It is certain that in general courts will not compel the performance of voluntary agreements. An agreement, in its nature, imports a reciprocity and a quid pro quo, and where that reciprocity does not exist, the power of enforcing it does not exist. I do not mean the cases of specialties where the deed itself is evidence of a consideration. I say I know no instance where a court of equity has compelled a man to execute what was a mere act of volition. But I think the present was not a mere voluntary agreement, and the court will (and I am warranted by the precedents to say that it has done so) attend to slight considerations for confirming family settlement and modifications of property. They pay a regard to reasonable motives and honorable intentions . . . They consider the ease and comfort and security of families as a sufficient consideration."

6. *Jeffreys* v. *Jeffreys,* Cr. & P. 138, 141; cf. Lord Cottenham in *Callaghan* v. *Callaghan,* 8 Cl. & F. 374, 401.

1

We may look at the interest of cestui que trust in either of two ways. From the orthodox standpoint, cestui que trust has a mere claim in personam against the trustee that he hold title to and use the trust res for the benefit of cestui que trust according to the terms of the trust. From this standpoint, the creation of an express trust is analytically a legal transaction of the same order as a contract. It is an act intended to produce obligation to which the legal system gives the intended effect, and the only difference between a contract and the creation of a trust is that in the one case the resulting obligation is recognized both at law and in equity, while in the other case it is cognizable only in equity. Putting aside constructive and resulting trusts, which are remedial devices to prevent unjust enrichment, trusts are created either with or without transmutation of possession. When created with transmutation of possession there is in effect what the Romanist would call a 'real' contract. The trustee acquires title to the res and undertakes to hold and use it for the benefit of cestui que trust. His obligation is bonae fidei arising from receipt of the trust res. When there is no transmutation of possession, the trust is created by the mere promise of the holder of the legal title to hold and use for the benefit of cestui que trust. This may be in substance a common-law contract, that is, it may be under seal or upon a common-law consideration, or it may be a gratuitous promise, as it were, an informal gift of the trustee's undertaking or of the equitable ownership, according to the theory adopted. Thus questions of consideration and of the enforceability in equity of undertakings without a common-law consideration are raised at the outset.

There has never been any difficulty where a common-law consideration is present. At an early date equity required something more than a covenant, although the seal would have sufficed at law to make it enforceable.[7] But it was soon determined that this something more need not be a common-law consideration.[8] Thus we got the so-called consideration of blood or of natural love and affection of which more presently. The result was to create a class of covenants which, so far as their form went, would be enforceable at law in an action for damages, but would not be enforceable in equity without more. To this initial anomaly the nineteenth century

7. *Bro.* "Abr." tit. "Feff. al use," 54 (1553).
8. *Sharington* v. *Strotton,* Plowd. 295 (1565).

added the case of a gratuitous declaration of a trust in chattels.[9] Accordingly we have this situation:

(1) If there is transmutation of possession, the undertaking to hold in trust which is enforced specifically could stand analytically as a common-law contract;

(2) If there is no transmutation of possession, a covenant to stand seized of realty to another's use, or today to hold it in trust for cestui que trust, which has all the requisites of an enforceable covenant at common law, is not enforced in equity unless there is an additional reason in the form of blood relationship;

(3) If there is no transmutation of possession, an undertaking upon consideration to hold in trust, which has the requisites of a common-law contract, is enforced in equity without more;

(4) If there is no transmutation of possession, a gratuitous undertaking to hold a chattel in trust, which could not stand as a common-law undertaking, is enforced without more.

It is apparent that law and equity are not at all in accord with respect to the theory of such undertakings.

Moreover, equity is not consistent with itself. For leaving out of account inconsistencies in equity in the treatment of undertakings to hold in trust, equity enforces a gratuitous undertaking to hold in trust for a donee, but not a gratuitous promise to give to a donee.[10] Hence in characteristic Anglo-American unsystematic fashion, "I give" plus "I accept" is a nugatory transaction at law and in equity without delivery, and "I promise to give" plus "I accept" is a nugatory transaction at law and in equity without consideration. But, in case of a chattel, "I hold in trust for you," without more, while nugatory at law, is good in equity on the sole basis of intention.

If we take a real view of the nature of the interest of cestui que trust, we are no better off. Granting that it is preferable to regard cestui que trust as equitable owner with rights available generally, subject to a liability to be cut off by trustee's power of conveying to a purchaser for value without notice, we must admit that over and above this there is an obligation, a claim in personam against the trustee that he hold and administer and account for the trust res according to the terms of the trust. This is wholly analogous to an obligation created by contract. Yet, as we have seen,

9. *Ex parte Pye*, 18 Ves. 140 (1811); *Jones* v. *Lock*, 1 Ch. App. 25 (1865).

10. *Antrobus* v. *Smith*, 12 Ves. 39, 46; *Edwards* v. *Jones*, 1 My. & Cr. 647, 671; *Richards* v. *Delbridge*, 18 Eq. 11; *Re Breton's Estate*, 17 Ch. D. 416.

equity does not treat it consistently as such with respect to the requisites of its creation.

2

While the word "consideration" is used in equity in several senses, a common idea of injury to the complaining party, through his having given quid pro quo or having acted to his detriment, runs through all of them except consideration of blood or of natural love and affection[11] and cases of defective execution of promises to secure a creditor, to settle upon a wife, or to advance to a child. The doctrine of consideration of blood or of natural love and affection is confined in equity to the one case of a covenant to stand seized to another's use. Attempts have been made to extend it to other cases.[12] But they have led to nothing, and in any consistent account of the requisites of a legal transaction producing obligation in equity it must be held an anomaly.[13]

3

In many cases courts of equity, while admitting that gratuitous promises were not enforceable in equity, and asserting that they would not compel the carrying out of executory gifts unless in the form of declarations of trusts in chattels, have tortured gifts into bilateral contracts in order to compel the donor to keep faith with the donee. A typical decision of this sort is *Ferry* v. *Stephens*.[14] In that case there was a written agreement whereby plaintiff's brother agreed to sell to her and she agreed to buy, but the writing was a cloak for a gift so as not to awaken the jealousy of other relatives. Thereupon, without receiving any money, the brother endorsed upon the writing a receipt for payment in full. After the brother's death, specific performance was enforced on the ground that there was a complete gift of the debt, that the written contract could not be contradicted by parol, and hence that there was a debt at law so that the agreement was not voluntary. But courts of equity have regularly looked behind recitals of consideration and refused to enforce gifts put in the form of contracts.[15] So long as it appeared that the whole transaction, of which the writing was but a part, was a gift, the court is

11. See *Ames*, "Lectures on Legal History," 125-7.
12. Cf. *King* v. *Thompson*, 9 Pet. 204, 219.
13. See *Ames*, "Lectures on Legal History," 147.
14. 66 N. Y. 321.
15. *Lamprey* v. *Lamprey*, 29 Minn. 151; *Graybill* v. *Brugh*, 89 Va. 895.

going on the form rather than the substance. In fact and in substance it enforces a gift. In spite of the receipt it could be shown that there was no payment, and that circumstance, with the other evidence, sufficiently proved what the court had before it. It should be noted that in New York a gift of a debt may be made by such a receipt.[16] In most common-law jurisdictions this would not be true and we may be reasonably sure that if holding there was a contract had led to the result of making the donee pay the pretended price, there would have been another outcome.[17] In most of the cases of this sort the promisor was dead and the question was between those to whom the ancestor had promised to give and his heirs who took as a windfall what had been promised to others. Under such circumstances, chancellors have felt that fairness required the donees to be preferred so long as neither heirs nor donees were out anything, and have given relief which very likely they would not have given against the donor himself.[18] In some cases of the sort the donee had acted on the faith of the executory gift. Leaving them aside for the moment, those with which we are immediately concerned show nothing in the least analogous to a common-law consideration.

4

Where the donee in a parol gift of land enters on the land under the gift and acts on the faith thereof, courts of equity uniformly enforce the gift.[19] For the most part they speak as if the whole question were one of the Statute of Frauds, and as if possession and the acts done after taking possession which take the case out of the statute were conclusive, ignoring the more serious question whether there is any contract at all. A typical case in which this question is

16. *Gray* v. *Barton*, 55 N. Y. 68; *Carpenter* v. *Soule*, 88 N. Y. 251.

17. In *Ungley* v. *Ungley*, 5 Ch. D. 887, a father promised that when his intended son-in-law married his daughter, he would give his daughter a certain house as a wedding present. On marriage he put them in possession but never conveyed. The court held this was not a gift but a contract and treated the case as if the Statute of Frauds alone raised any difficulty. But if there was a contract, it was bilateral, and it is stretching the facts to say that the daughter made a new contract with her father to marry the man to whom she was already engaged!

Cf. also *Finch* v. *Green*, 225 Ill. 304; *Legate* v. *Legate*, 249 Ill. 356; *Freeman* v. *Freeman*, 43 N. Y. 34. And see the suggestive note by *Professor Schofield*, ILL. LAW REV., VI, 202.

18. Compare the case of reformation against the heir of a deceased donor. *McMechan* v. *Warburton* [1896], 1 I. R. 435, 441, and the cases cited in *Ames*, "Cases on Equity," II, 247 n. 2. But see *Strayer* v. *Dickerson*, 205 Ill. 257, 266.

19. See cases cited in *Ames*, "Cases on Equity," I, 307, n. 4, 309, n. 11.

discussed is *Seavey* v. *Drake*.[20] There a father, wishing to assist his son, put him in possession of a tract of land as a gift and the donee on the faith of the promise expended some $3,000 in improvements. The court said: "The expenditure in money or labor induced by the donor's promise to give the land to the party making the expenditure constitutes *in equity* a consideration for the promise, and the promise will be enforced."[21] It is admitted here and it is true in all these cases that there was no contract at law. But we are told there is a contract in equity because equity takes a more liberal or substantial view of consideration than that taken at law.[22] The case usually cited for this proposition is *Crosbie* v. *McDoual*.[23]

In that case a testator, after providing an annuity and a legacy for the donee, told her that he would provide her a house free of expense and entered into negotiations for the purchase of one. Accordingly, and in reliance thereon, the donee thereafter made expenditures and incurred liabilities to third persons. The promise to provide the house was specifically enforced against the representatives of the deceased donor. It will be noted that here, as in most of these cases, not only had the donee acted on the gift, but the contest was between a donee and the representatives of a deceased donor. Evidently there was no common-law contract. But Lord Erskine assumed that there was. He did not suggest any difference between law and equity in this regard.[24] And this is true in most of the cases cited for the proposition that acts subsequent to the promise constitute consideration in equity though not at law.[25]

---

20. 62 N. H. 393.

21. Id. 394.

22. "Equity fully adopts the rule that no contract shall be enforced which does not rest upon a valuable consideration, but construes and applies it somewhat more rationally and less technically. Thus equity will not enforce a mere voluntary contract, for it permits one to withhold what he has of his own accord, and not for any benefit to himself or expectation of any benefit, volunteered to promise. And yet if the promisee, on the faith of the promise, does some act or enters into some engagement or arrangement, which the promise justified, and which a breach of the promise would make very injurious to him, this *equity might regard* as confirming and establishing the promise in much the same way as a consideration for it would": *Parsons*, "Contracts" (9 ed.) III, 359. This statement does not appear in the first and second editions. It is first found in the third edition (1857), Vol. II, p. 517. It should be noted that Parsons was by no means sure of his statement as shown by the words I have italicized.

23. 13 Ves. 148.

24. After reciting what the donee did on the faith of the promise, he says: "That forms a consideration in the law": id. 160.

25. E. g., *King* v. *Thompson*, 9 Pet. 204, 218. *Shepherd* v. *Bevin*, 9 Gill, 32, 39-40, suggests by inference but does not actually make the distinction. But the court relies also on the "meritorious consideration" of blood relationship and speaks of a widow's desire to "gratify the last expressed wishes of her deceased husband" as a consideration.

What shall we say of this line of decisions? Five theories are conceivable.

(1) We might say that these are not cases of contracts enforced specifically, but are rather cases of parol conveyance in which putting the donee in possession is in substance equivalent to a livery of seisin. Thus there is the substance of a common-law conveyance and only the Statute of Frauds is in the way.[26] Hence after expenditures and improvements on the faith of the gift, equity compels the conveyance required by the Statute of Frauds, as it were, in its jurisdiction in favor of a party quia timet. Possession meets the policy of the Statute of Frauds, and a situation where it is more equitable to carry out the gift than to undo what has been done on the faith of it moves the chancellor to act.[27]

(2) There is much in the books to suggest that the Roman "pactum donationis" was not without influence in equity.[28] As late as 1883 common-law judges were saying that "a clear intention expressed on the part of the donor to give and a clear intention on the part of the recipient to receive and act upon such gift" sufficed to pass title to a chattel at law without delivery.[29] If this view were adopted, improvements or expenditures on the faith of the gift might well be held "acts of acceptance."

(3) It has sometimes been suggested that these cases proceed upon the lines of constructive trust; that there is a constructive trust for the donee because otherwise the court cannot prevent a fraud upon the donee who has improved the land on the faith of the gift. But so far as the donor or his representatives would be unjustly enriched by the benefit conferred by donee in reliance on the gift, it is not necessary, nor is it proper, to raise a constructive trust of the

26. *Miller* v. *Lorentz*, 39 W. Va. 160, 165 ff. In *Sugden*, "Vendor and Purchaser" (14 ed.) 152, n. p, attention is called to some old cases, before the Statute of Frauds, where equity refused specific performance of oral sales of land where money was paid but possession was not given. See *William* v. *Nevill*, Tot. 72; *Miller* v. *Blandist*, id. 24.

27. This might explain *Kaufman* v. *Cook*, 114 Ill. 11. There donor had no estate to give at the date of the promise; there could be no parol conveyance since there was no seisin to deliver and a writing under the statute would not have passed a title. Compare the cases such as *Rerick* v. *Kern*, 14 S. & R. 267, where a parol license is acted on. There can be no pretense that such cases proceed on any theory of contract. But there is no such thing as a parol conveyance of an easement. The weight of authority is now decisively against the doctrine that equity will enforce an easement in such cases: *Warren*, "Cases on Property," 809, n.

28. Note the discussion of Roman law and citation of civil law authorities in *Ward* v. *Turner*, 2 Ves. Sr. 431 (1752).

29. Pollock, B., in *Re Harcourt*, 31 Weekly Rep. 578, 580. Cf. Parke, B., in *Ward* v. *Audland*, 16 M. & W. 862, 870; Parke, B., in *Oulds* v. *Harrison*, 10 Exch. 572, 575; Crompton, J., in *Winter* v. *Winter*, 4 L. T. N. S. 639, 640.

land. It is enough to compel restitution of the benefit.[30] In truth we have nothing here but a way of putting the theory of taking cases out of the Statute of Frauds, which is better put by Lord Selborne in *Maddison* v. *Alderson.*[31] This is well enough as to the Statute of Frauds. But the difficulty is more than want of a writing. We must find something of legal import to enforce.

(4) Some of the cases, chiefly those which enforce a parol license acted on as if it were a contract to convey an easement, speak of equity preventing an "unconscionable revocation." Perhaps it is enough to say that, applied to the cases immediately under consideration, this assumes that there is something of legal efficacy to revoke.

(5) Lastly there is the theory of Parsons on "Contracts," adopted in *Seavey* v. *Drake,* that equity takes a different view of what is needful to make a contract from that taken at law and that expenditure after a promise and on the faith thereof will make the promise enforceable in equity though not enforceable at law.

It will be noted that in all these cases of gifts acted on there is something not without analogy to a deceit. The donee puts himself in a worse position with the knowledge and acquiescence of the donor in reliance on the promise. Hence the chancellor feels it is fair that the donor be held to carry it out.[32] No doubt the chancellor acted largely on his intuitions of what fair play called for, and we have now to put order and logic into his results as well as we may.

5

As a general rule a defective conveyance will not be reformed so as to make it effective against a donor at suit of a donee. To do this would be in substance to decree specific performance at suit of a donee. If the donor has not fully and completely executed his gratuitous promise to give, a court of equity will usually refuse to grant specific performance under the guise of reformation.[33] But there are cases where it will do so. A creditor who has received less than was intended by a subsequent conveyance as security which the

30. *King* v. *Thompson,* 9 Pet. 204, 221.

31. 8 App. Cas. 467, 475-6.

32. As to the connection of this idea with consideration in equity, see *Ames,* "Lectures on Legal History," 127.

33. *Lister* v. *Hodgson,* 4 Eq. 30, 34. "It is well settled that equity will not interfere to enforce a voluntary contract to convey. . . . A defective attempt to make a voluntary conveyance stands upon the same ground. Judicial tribunals act to enforce legal obligations, not to compel parties to carry into execution mere benevolent intentions which they may once have entertained, but have subsequently abandoned": *Eaton* v. *Eaton,* 15 Wis. 259.

debtor was not legally bound to give him,[34] a wife for whom provision has been made by a conveyance,[35] or child or other person toward whom the grantor stood in loco parentis,[36] may sue for reformation, although there was no common-law consideration, and the result is in substance specific performance of a legally unenforceable promise. For in none of these cases is there a common-law contract. In some of them the donor was dead, and there is the situation already noted where, as between a donee who is out nothing and the heir or representative of the donor who also is out nothing, equity prefers him who has a moral claim rather than one who takes by a windfall what was intended for another.[37] But the significant cases are those cited in which relief was given inter vivos. Here the courts speak of a "meritorious consideration," and regard the transaction as valid in equity, although it creates no obligation at law. But it is significant that beyond some fleeting dicta no court has been willing to enforce specific performance in such a case otherwise than by way of reformation.

6

Although courts of equity are accustomed to say that they will not aid a volunteer, and will not give specific performance of a contract under seal where there is no common-law consideration, they enforce options under seal.[38] *O'Brien* v. *Boland*[39] is a typical case. Here there was an "offer" under seal to sell within ten days. It was withdrawn three days later but was accepted by the plaintiff in four days. The defendant argued that plaintiff could not have been made to take, and so there was no mutuality of remedy, thus assuming that there was a promise under seal analogous to a unilateral simple

34. *Comstock* v. *Coon*, 135 Ind. 640; *Rea* v. *Wilson*, 112 Ia. 517; *Rhodes* v. *Outcalt*, 48 Mo. 367; *Miller* v. *Savage*, 60 N. J. Eq. 200.

35. *Stewart* v. *Brand*, 23 Ia. 477; *Powell* v. *Morrissey*, 98 N. C. 426; *Huss* v. *Morris*, 63 Pa. St. 367.

36. *Baker* v. *Pyatt*, 108 Ind. 61; *Hout* v. *Hout*, 20 Ohio St. 119; *Powell* v. *Morrissey*, 98 N. C. 426; *Huss* v. *Morris*, 63 Pa. St. 367.

37. Undoubtedly the foregoing cases were influenced by the doctrine of granting relief in case of want of surrender of a copyhold or defective execution of powers, where equity has always aided a creditor, wife, child, or charity after the death of the debtor or donor: *Ames*, "Cases on Equity," II, 304, n. 1. These categories go back to "Doctor and Student," Dial. ii, ch. 24, as cases where in conscience a promise should be carried out.

38. Cases contra, e. g., *Crandall* v. *Willig*, 166 Ill. 233; *Graybill* v. *Brugh*, 89 Va. 895, go on the supposed lack of mutuality of remedy in a unilateral contract.

39. 166 Mass. 481. See cases in accord in *Pomeroy*, "Equity Jurisprudence" (3 ed.) VI, § 773, n. 46.

contract. The court granted specific performance on the ground that acceptance within the time fixed "made it a mutual contract," thus treating it as an offer and assuming that the attempt at revocation was nugatory.

Cases of this sort might conceivably take either of three forms.

(1) There might be a contract under seal on condition of exercise of the option by the holder within ten days; a unilateral contract, as it were, to make a conveyance if the plaintiff called for it in ten days. But if so, would equity enforce it on the basis of the seal alone? In any other case, clearly not.

(2) There might be an offer, with all the form and characteristics of an offer, but under seal. The books contain statements that an offer under seal is irrevocable.[40] But it has been held otherwise in Massachusetts,[41] and so it would seem *O'Brien* v. *Boland* must be explained in some other way.

(3) There might be an offer plus a collateral promise (a) under seal or (b) upon consideration, to hold it open for a certain time. It is generally assumed that a collateral promise to keep an offer open makes it irrevocable. If the collateral promise is upon consideration and the case is one of which equity has jurisdiction, this may well be on the ground that equity would specifically enforce the collateral promise and so the law today, as in some other cases, goes across directly to the ultimate result. But if the promise is under seal, we should encounter the difficulty that equity is supposed not to act on the basis of a seal alone. This is not a question that belongs here, and it is enough to say that if the law has for any reason reached the desirable result that a collateral promise under seal or on consideration to keep an offer open precludes revocation, equity may properly follow the law.

It is seldom, however, that we find such collateral promises. Usually there is a contract under seal or in consideration of money paid down to convey on payment or other act within a fixed time, or what is in form an offer under seal specifying a certain time for acceptance. Where the promise is in consideration of money in hand paid to convey on condition of payment of a fixed price by a given date, how does it differ legally from a like promise under seal? No one talks about an offer in the first case. Why, then, in the other?

40. *Xenos* v. *Wickham*, L. R. 2 H. L. 296; *McMillan* v. *Ames*, 33 Minn. 257.

41. *Match Co.* v. *Hapgood*, 141 Mass. 145.

These are frequently called irrevocable offers.[42] But wherein does such an offer differ from a contract on condition? The only difference between a contract on condition of payment and an offer to be accepted by payment would seem to be in the revocability of the latter prior to acceptance. If it is irrevocable, we have a binding promise on condition, and if equity enforces it on the basis of the seal only, it is doing what we are told it will not do, namely, enforcing a formal promise on the ground of the formally declared intention of the party, although there is no consideration.[43] But we should not overlook that these cases differ from mere gifts in that there is a business transaction in which the holder is to be something more than a mere recipient of the promisor's bounty. He is not to get the property without paying for it. And yet the option in and of itself is valuable, and for that the holder of an option under seal gives nothing. If the promisor is compelled to adhere to it on the sole ground of a seal, equity is after all enforcing a promise in favor of one who makes his claim on the sole basis of formally declared intention.

Looking back over these six types of case, we may see that many different things have moved the chancellor. In the gratuitous declaration of trust he felt that there was the substance of a conveyance of the equitable interest. In the covenant to stand seized he felt that he was not dealing with an ordinary case of spontaneous offhand liberality, and that what Lord Henley called "the peace of families" called for upholding such trusts. In the case of gifts tortured into contracts, he felt that the donee made a stronger appeal than the heir who got as a windfall. In the case of donees in parol gifts of land, he felt that the donees were not getting something for nothing in view of the expenditures made on the faith of the gift, and that there was something akin to deceit if they did not get the land. In the case of reformation of defective gratuitous conveyances, he felt that creditor or wife or child was not an ordinary donee and made a stronger claim than one who took through mistake what debtor or husband or parent had sought to give them. In the case of options under seal he felt that these are after all business

42. *Pomeroy*, "Equity Jurisprudence" (3 ed.) VI, § 773. See *McGovney*, "Irrevocable Offers," Harvard Law Rev., XXVII, 644. But see *Langdell*, "Summary of Contracts," § 178. The "implied" collateral promise in these cases is but a dogmatic fiction.

43. These cases have usually been treated by the courts as involving questions of mutuality of remedy. But those questions are quite irrelevant in a unilateral contract where the promisor needs no remedy, and they have served to cover up the more difficult question, what it is that the courts are enforcing and why they do so.

transactions and not ordinary gifts. But behind all these is a deeper feeling that faith ought to be kept, that so far as possible he ought to hold men to their promises, that a deliberately declared intention to benefit another ought to be given effect. In part these cases are thus connected with the attempts in the eighteenth and nineteenth centuries to bring our law to the will-theory of legal transactions and to give legal efficacy to declared intention without more.[44] Much more, however, they are symptoms of the perennial movement in the law toward a fuller and wider securing of interests and hence toward a wider and fuller enforcement of promises. If our law as it stands is not susceptible of consistent systematic statement in this respect, it does not differ from the classical Roman law, where, for the same reason, successive development of new categories of enforceable promises brought about a result that defies critical analysis.

II

Analytically we should start with the proposition that equity gives an extraordinary complementary remedy upon contracts where the legal remedy is inadequate to secure the legal right. Hence what is a contract should be wholly a question of common law. The questions in equity should be as to the adequacy of the common-law remedy, as to the advisability of the chancellor's exercising jurisdiction, if he finds he has it, and as to the most just and effective mode of applying equitable remedies to the case under the circumstances. In general, courts of equity have come to this conclusion. For the most part they follow the law as to the requisites, incidents, and effect of legally binding promises.[45] The cases where equity does not or is thought not to follow the law in these respects appear to be six:

(1) The question of consideration here under discussion;

(2) Certain cases of cancellation where, although the declared wills of the parties appear to coincide, their actual wills did not because of unilateral mistake;[46]

(3) A certain tendency to make over contracts in connection with specific performance with compensation;[47]

44. I have discussed another phase of this movement in a paper in Harvard Law Rev. XXXI, 1047, 1055-7.

45. *Hedges* v. *Dixon County*, 150 U. S. 182.

46. E. g., *Goodrich* v. *Lathrop*, 94 Cal. 56 and cases cited in *Ames*, "Cases on Equity," II, 187, n. 2; *Burkhalter* v. *Jones*, 32 Kan. 5, 12; *Silverman* v. *Minsky*, 109 App. Div. 1.

47. See the remarks of Jessell, M. R., in *Cato* v. *Thompson*, 9 Q. B. D. 616, 618, and of Farwell, J., in *Rudd* v. *Lascelles*, [1900] 1 Ch. 815, 819.

(4) Certain cases where equity has dispensed with the performance of express conditions precedent;[48]

(5) Certain differences of view as to how far time is a material element, which have probably ceased to be important otherwise than in name since the adoption at law of more liberal views of breach of implied condition by breach of contract in limine; and

(6) Certain results of the proprietary view of the rights of a purchaser in a land contract in connection with risk of loss and breach of terms as to time which at law would be treated as breaches of condition.[49]

Many of these are moribund and the first two are the most important, for they go to the root of what is an enforceable promise and why the law enforces it. This is no place to discuss the second. But the two are closely connected, as I shall endeavor to show presently.

An analytical theory assumes that the whole body of the law came into existence at one time by one stroke. A theory of the concurrent jurisdiction of equity over contracts assumes a settled body of common-law doctrine as to contracts, and that the chancellor, accepting this for his substantive law, proceeds to administer more adequate remedies to make that substantive law more effective in action. On the whole, such an account of the jurisdiction of equity over contracts is not far from the truth. We have seen that equity departs from the legal view of what constitutes an enforceable promise (a) by not enforcing promises under seal as a general rule, without something additional; (b) by enforcing promises neither under seal nor upon common-law consideration to a certain extent in certain exceptional cases. Nevertheless, our analytical account of the matter not only comes as near to being a correct account as any analysis can in our law but, what is more important, it sets forth the goal toward which, by and large, equity has steadily moved. But in the actual course of history we have quite another story. The common law as to contracts was far from settled until the nineteenth century. Meanwhile chancellors were acting on such

48. See *Ames*, "Cases on Equity," II, 321, n. These cases are very doubtful. Those in which the condition was dispensed with in order to prevent unjust enrichment after part performance, as Dean Ames points out, would be better treated by requiring restitution or compensation for the benefit than by making over the contract. In the cases of fraud, with all allowances for the multifarious meanings of waiver, we may well say that the express condition was waived. In many of the cases of contracts for sale at a valuation the question was one of interpretation. But some courts have made such contracts over.

49. As to the latter, *Drinkle* v. *Steedman*, [1916] A. C. 281, is perhaps a significant symptom of change.

theories and doctrines as were at hand. In the seventeenth and eighteenth centuries, for want of satisfactory legal rules, the chancellor continually turned to his staple analogy of a trust, and so the law of vendor and purchaser developed in equity along proprietary lines as well as along contractual lines. Many of our doctrinal difficulties arose in this way. It is as if the chancellor were riding two horses, one a property theory, the other a contract theory. In general, by a little skilful shifting of his weight from one foot to the other and some shrewd balancing, he manages well. But at times he must, for the moment, shift definitely to the one or the other, and when both feet are on the property theory our analysis is at fault. Other difficulties come from a parallel development of the subject at law and in equity as in the case of implied conditions at law and mutuality in equity, two ways of achieving the same substantial result, worked out independently. Others come from the court of equity in early cases following what was taken to be the common law at the date of the decision, and thus establishing a precedent in chancery upon which decisions in equity proceeded thereafter more or less independent of subsequent development at law. Hence history has more than ordinary importance in this connection.

III

As we have them our doctrines of equity come almost wholly from the seventeenth and eighteenth centuries. It is true that equity acted at a much earlier date in many cases in which it now acts. It is no doubt true, also, that a certain amount of traditional practice survived into the era of published reports and reliance as a matter of course upon precedents. But the doctrinal development of the grounds and details of the chancellor's action is post-Elizabethan. The seventeenth century was a period of legal growth. Many old things got a modern form. Many new things came in bodily under the influence of ideas of natural law. Above all, the course of development of equity had been definitely set in legal channels by the settled practice of putting common-law chancellors upon the woolsack and of relying upon the reported decisions of those chancellors.[50] How completely a traditional course of decision resting only in the memory of practitioners may fail, when men come to rely on printed reports, is shown by the development of English law in

50. See a striking statement of the state of things, temp. James I in *Norburie*, "The Abuses and Remedies of Chancery," *Hargrave*, "Law Tracts," 424, 430-431.

this country after the Revolution.[51] The history of consideration at law prior to the sixteenth century has been written repeatedly. For our present purpose it is more important to look to the history of enforcement of promises in equity in the seventeenth and eighteenth centuries. But this cannot be done without taking some account of what was going on at the same time upon the continent.

From the twelfth to the seventeenth century continental jurists took the categories of the Roman law for granted. In the sixteenth century, as men sought to put reasons behind them, these began to be questioned. And when reasons were to be put behind the Roman law of enforcing promises, it soon proved a difficult task. Thus a controversy arose which raged down to the end of the eighteenth century. Why should the law enforce promises? What reasonable basis could be found for enforcing some and not others? This was one of the battle-grounds of jurisprudence in the seventeenth and eighteenth centuries.

Let us look back at the Roman law a moment. The strict law did not enforce a promise or pact as such.[52] If one chose to rely on another's mere promise, he must not ask the law to help him. To induce the law to act he must show that he was entitled to a remedy which the law annexed to some formal situation, for example, "nexum," where the people had been called to witness, or "iusiurandum" or "sponsio," where the gods had been called to witness, and if the law did not deal with the impious promisor, the wrath of the gods might be a social danger. Unless clothed with the form of solemn declaration before witnesses with coin and balance, or the solemn question and answer using the sacramental word "spondeo," or written entries in the household books, there was but natural, not legal, obligation. In other words, the strict law called for some legal reason ("causa ciuilis") for enforcing the promise.[53] When jurists began to analyze the matter they were able to say that there were two elements in contract, first, a pact, and second, a civil reason

51. Kent wrote in 1828 that during his whole term not a single decision or dictum of his predecessor was cited to him. "I took the court as if it had been a new institution and never before known in the United States. I had nothing to guide and was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable": *Kent*, "Memoir of Chancellor Kent," 157-8. But Kent was not appointed chancellor till 1814, a whole generation after the close of the Revolution.

52. "Ex nudo pacto inter ciues Romanos actio non nascitur": *Paul*, "Sententiae," II, 14, § 1.

53. It should be noted that this is not a reason for making it, but a reason for enforcing it. But modern juristic thinking has considered good reason for making as a reason for enforcing and so changed the meaning of the phrase.

for enforcing it, to be found in the form in which the pact had been clothed. And as the necessities of commercial development and growth of the law through ideas of equity and natural law proceeded, there was a steady but somewhat irregular increase in the number of actionable pacts. Additional civil reasons developed beside form. There might be the delivery of a res or there might be the doing of something. In a few cases mutual assent came to suffice. Thus ultimately in Roman law there was legal reason for enforcement if there was promise plus form, or promise plus the delivery of a res (though in the 'real' contracts the significant duties are annexed to the transaction by law rather than promised), or if the promise came under one of the four categories of consensual contract. To these were added certain classes of actionable pacts, some equitable in origin, some statutory. The Roman law got no further.

In the seventeenth century men insisted that the *legal* reason was unimportant. What they wanted was the *moral* reason. For under the theories which then prevailed, if they found a moral reason, that would suffice for a legal reason also. Hence "causa" comes to mean some *rational* ground for enforcing a promise. What was such a ground?

Three factors in the controversy may be detected. One of no small moment was the settled principle of Germanic law which required a "causa debendi."[54] This seems to be the origin of the theory of equivalents which plays so large a part in juristic discussion of what promises should be binding. Another was casuist writings as to what promises were binding in conscience.[55] Out of these and of philosophical and ethical theories comes the doctrine of the inherent binding force of a promise simply as such. A third factor was the idea that Roman law was embodied reason which gave to the phrase "nudum pactum" a sort of hallmark of intrinsic value. Two main lines of theory resulted. On the one hand, jurists said, look for an equivalent. If one who has or has had an equivalent has promised, he is morally bound to perform. On the other hand, under the influence of the theory of the intrinsic moral force of promises, others said, look for intention. Was there intention to enter into a legal transaction? If so, the promise was morally bind-

54. *Heusler*, "Institutionen des deutschen Privatrechts," I, 81; *Amira*, "Nordgermanisches Obligationenrecht," I, 343; *Huebner*, "History of Germanic Private Law," § 82. Cf. *Glanvill*, x, 3.

55. See the echoes of this literature in "Doctor and Student," Dial. ii, ch. 24. Cf. c. 1, X. *de pactis*.

ing, and so must be legally binding.[56] After some struggle, continental jurists definitely took the second line. They came to hold the intention of the promisor a sufficient "causa." Thus causa came to mean simply that there must be a promise made as a legal transaction.[57]

Similar ideas may be seen in our books as far back as "Doctor and Student." The Doctor puts the question what promises are binding in conscience, and lays down three cases, (1) a vow,[58] (2) a promise upon consideration, and (3) a promise made to a corporation or to the clergy "to the honor of God, or such other cause like, as for maintenance of learning of the commonwealth, or of the service of God, or in relief of poverty, or such other."[59] The word "consideration" is used in "Doctor and Student" in two senses. Sometimes it means the presupposition of a transaction, the reason for it, so that in the passage cited the Doctor's meaning would be that a promise made for a reason is morally binding.[60] Often the phrase "upon consideration" is used in the sense of "after deliberation." Thus we have the other idea that a promise deliberately made is morally binding. Indeed in his third category, promises to charity, the reason for enforcement is that the promisor intended a binding promise; that he made it as a legal transaction.[61] His idea is that intention to make the promise as a legal transaction is vouched for in the first case by the vow, in the second case by the reason for making it, in the third case by the purpose of making it. This subordinates the equivalent theory definitely to its rival. The "causa debendi" is but a voucher for the intention with which the promise

56. See, e. g., the discussion in *Grotius*, ii, 11, §§ 2-4, and *Pufendorf*, "De Jure naturae et gentium," iii, 4, §§ 2, 5, 6.

57. *Stryk*, "Tractatus de cautelis contractuum necessariis" sec. 3, cap. 6, § 1, "Opera omnia" (ed. 1840) XIII, 311; *Glück*, "Pandekten," IV, § 292; *Pothier*, "Traité des obligations," I, 1, § 2; *Bell*, "Principles of the Law of Scotland," §§ 7-9. This is well stated in *Lee*, "Roman Dutch Law," 197-199.

58. Cf. Sext., xviii 2 (1289).

59. "Doctor and Student," Dial. ii, ch. 24.

60. This is a natural outgrowth of the Germanic principle of causa debendi. It should be noted that causa is now used by civilians in this same sense of "presupposition": *Windscheid*, "Pandekten," I, § 97.

61. "I think that he is bounden in conscience to perform it though there be no consideration of worldly profit that the grantor hath or intended to have for it. And in all such promises it must be understood that he that made the promise intended to be bound by his promise, for else commonly by all doctors he is not bound unless he was bound before his promise." Dial. ii, ch. 24. Cf. what the doctor says as to the vow: "And he that doth make such a vow upon a deliberate mind intending to perform it is bound in conscience to do it": ibid.

was made.[62] In its further course the development of a theory of this subject is a struggle between the two ideas, causa debendi and voucher for deliberate intention, in which they are often confused.

Answering the Doctor's argument as to the binding force of deliberately intentional promises, the Student gives the conventional reason of the common-law lawyer: Intention is purely internal; it must be objectively manifest in the predetermined form before the law may notice it.[63] As thus given, the reason runs back to the days when the jury were witness-triers and decided on the knowledge of the vicinage; the days when it could be said that the intent of a man should not be tried. But the chancellor had better engines for getting at things of the sort, and this reason was not likely to appeal to him. Also it is connected with the idea of the strict law that a man of full age must look out for himself. He must not call on the law to save him from himself. If he has foolishly trusted another's word, he must bear his disappointment or loss.[64] This, too, did not appeal to chancellors who were saying their office was "to correct men's consciences for frauds, breach of trusts, wrongs and oppressions of what nature soever they be, and to soften and mollify the extremity of the law."[65]

When such ideas were agitating, naturally the chancellor wanted to be shown a "causa," a reason, for enforcing promises under seal. Naturally, also, he would be moved to enforce promises where he found a reason, whether they were legal contracts or not. But theories of the moral basis of binding promises were not settled, and as a common-law lawyer he was more and more disposed to find reason declared for him in the rules of law. Just what constituted sufficient reason for enforcing promises he never settled consistently. Different ideas of causa or of consideration

62. Cf. *Grotius*, ii, 11, § 4, ¶ 3: "There may, however, by natural law, be other signs of a deliberate purpose besides the formality of stipulation or anything else which the civil law requires as a ground for an action. But what is done not of deliberate intention we also do not hold to have the force of obligation."

63. Dial. ii, ch. 24.

64. Compare the reasons given for refusing recovery for a benefit conferred without request by building in good faith on another's land—it was said there was an acquisition from the "folly of another": *Britton*, ii, 2, § 6. Also the doctrine of the strict law as to interpleader in detinue where the party's own "folly" subjected him to danger of inequitable double vexation. Y. B. 19 Hen. VI, 3 pl. 6. See *Reeves*, "History of English Law" (Finlason's ed.) II, 639. Also the reason for the legal independence of mutual promises—"One's bargain is to be performed according as he makes it. If he make a bargain and rely on another's covenant or promise to have what he would have done to him, it is his own fault": *Thorpe* v. *Thorpe*, 12 Mod. 455.

65. Lord Ellesmere in *Earl of Oxford's Case*, 1 Ch. Rep. 1.

dictated this rule and that, and the whole was not whipped into consistent shape, for equity had only a limited jurisdiction over promises, and that concurrent, and the spirit of the strict law ruled on the whole in the common-law courts until the time of Lord Mansfield. He came just at the end of the reign of natural-law ideas, and immediately after him, in the stage of maturity of law, men reverted to the ideas of the strict law.

The common law, when men began to inquire into the natural or moral basis of enforcing promises, had not advanced to the stage of a general theory of contracts, much less of legal transactions. There was but a set of disconnected remedies—debt on a formal acknowledgment of indebtedness; debt, or its outgrowth detinue, upon an exchange, a loan of money or a bailment; covenant to recover damages upon a sealed promise; assumpsit on a simple promise on consideration; and account upon a duty to account as "bailiff, receiver or guardian." Three quite different ideas underlay these actions. Behind debt on a bond and covenant is the idea of a conclusive mechanical mode of trial by producing the sealed instrument, the form of which precludes all controversy. Behind debt for a loan and detinue is an original proprietary conception. The creditor or bailor is recovering his property from debtor or bailee. Behind special assumpsit is a delictual idea, an idea of a wrong to or deceit upon the promisee who acts to his detriment in exchange for the promise. Behind account is something very like the obligation bonae fidei upon a 'real' contract at Roman law. True, the old idea of a causa debendi lurks in the background of most of them, for the bond was in form an acknowledgment of indebtedness. Originally the indebtedness was incurred in some other way, perhaps by the old forms, and the seal merely precluded the debtor from waging his law or denying the debt since it admitted only of a mechanical trial by producing the instrument. But this could not be said of covenant, where there was no causa debendi and the seal came to be rather a reason for enforcing.[66] And the memory of it was lost in debt on a bond. Hence there seemed to be two cases where promises as such were enforced on the basis of form alone. When men were inquiring into reasons, and could not admit form as a reason, they could only say that the form "imported" a reason "because of the deliberation and cere-

66. Compare the common-law doctrine of gift of a chattel by deed without delivery as an inference from the procedural force of a seal in estoppel by deed.

mony in the confection of it."[67] This would not satisfy a chancellor, looking for substance rather than form, and gives us almost at the outset a legal contract unenforceable in equity.[68] It is clear enough that the common-law consideration did not come from the Romanist causa by way of equity.[69] The institution is one of the common law, and, with ideas from without, it went to make up the doctrines that obtain in equity. Chief among these external factors were increased study and better knowledge of the Roman law, as a part of the humanist movement, and the idea of natural law, the tendency to seek the reason of the thing and to hold that that must fix the law, the quest for ethical bases of legal institutions and desire to make law and morals coincide. On the continent, where the same ideas were fermenting at the same time, argument turned on the Roman phrases "nudum pactum" and "causa ciuilis," a bare promise and a legal reason for enforcing it. With us the catch words were "nudum pactum," a borrowed phrase, and "consideration." In the sixteenth and seventeenth century books we find "cause" and "consideration" more or less interchangeably. No doubt the definite annexation of the chancellor's office to the legal profession decided the matter for the common-law term and turned the course of development in equity into common-law lines.

Four different types of causa got the name of consideration in equity: (1) Any reason, for example, consideration of blood or of natural love and affection; (2) any moral reason, i. e., moral causa for making and hence for enforcing what had been promised pursuant thereto; (3) some equivalent, whether before, contemporary with, or subsequent to, the promise; (4) exceptionally, intention to enter into a legal transaction. Lord Mansfield came very near establishing the second, if not the fourth, at law. And not only in the case of gratuitous declarations of trust in chattels without transmutation of possession, but in some cases of "waiver," the fourth idea became definitely established. For in these cases of "waiver" there is nothing beyond a declared intention to forego a right. There is no causa other than intention and none is called for. Here we treat "waiver" as a legal transaction.[70] But we are not consistent

67. *Bacon*, "Uses" (Rowe's ed.) 13.

68. "No court of conscience will inforce donum gratuitum, though the intent appear never so clearly": id. 14.

69. *Ames*, "Lectures on Legal History," 147.

70. E. g., waiver of an equitable defense by a surety: *Mayhew* v. *Crickett*, 2 Swanst. 185. Lord Eldon, who while cautious in appearance, was often bold in what he did, is responsible for this rule as also for the enforceability of gratuitous declarations of trust in chattels. The resemblance to the Roman doctrine that a prior obligation would sustain a subsequent pact to perform is noteworthy: Dig. xiii, 5, 1, §§ 6, 7.

in doing so. The deliberate renunciation of a trust legacy, without mistake or fraud, is ineffectual in the absence of seal, common-law consideration, or estoppel.[71] In order to perform *this* legal transaction, one must add to his declared intention the form of a seal or the form of a common-law consideration, or the other party must have acted upon it injuriously. Here we have "causa ciuilis" pure and simple. The form of a seal or the form of a bargain or injurious reliance must be added to the pact to give a legal reason for enforcing it.

Let us look at these uses of "consideration" more closely. In *Sharington* v. *Strotton*,[72] there was a covenant to stand seized to the use of a brother, reciting (a) intent to keep the land in the family, (b) brotherly love and good will toward the brother. The plaintiffs argued against the use that there was no transmutation of possession and no equivalent or bargain.[73] Throughout their argument they use "cause" in the sense of common-law consideration.[74] But they put the common-law consideration in assumpsit as a reason for enforcing a promise, in the very sense of "causa ciuilis," and yet use "consideration" in the different sense of any "motive" or "reason" for making a promise. The defendants use "consideration" consistently to mean any reason for making the promise.[75] Most significant, however, is their curious jumble of common-law doctrine, civilian reasoning, and natural-law philosophy. It runs something like this: By Roman law (embodied reason) there is no action on the bare promise. But in morals a deliberate promise binds and when made as a legal transaction it ought to be enforced. Also in assumpsit one cannot claim to recover unless the promise was one on which he was entitled to rely, that is, a de-

71. *In re Young*, [1913] 1 Ch. 272.

72. Plowd. 298 (1565).

73. They put the equivalent theory: "The bargainor shall be seized to the use of the bargainee because he has done an act upon consideration, that is, he has bargained the land for money; and inasmuch as he hath the money . . . it is reasonable that the bargainee should have something for it": id. 301.

74. "For if upon consideration that you are my familiar friend or acquaintance or my brother, I promise to pay you £20 . . . you shall not have an action . . . for it is but a nude and barren contract . . . and there is no sufficient cause for the payment": id. 302.

"There is no cause here but what would have been if no such covenant or indenture had been made. But the common law requires that there should be a new cause, whereof the country may have intelligence or knowledge for the trial of it": id. 302.

75. "The considerations are in number four . . . the affection of the said Andrew Baynton for his heirs males . . . and his provision in the estate made for their security . . . the continuance of the land in the name of Baynton . . . the brotherly love . . . . [and] the marriage had between Edward Baynton and Agnes his wife": id. 303.

liberate one. But the sealing and delivery of a deed show deliberation. Hence there is reason for enforcing the deed and this is consideration.[76] Further on it is added that "every deed imports in itself consideration, viz., *the will of him that made it.*"[77] Here "consideration" means "causa" in the sense that ultimately prevailed on the continent, that is, intention of a legal transaction. The court, in upholding the covenant, uses consideration in the sense of any reason for making the promise.[78] Thereupon the reporter adds two quotations from the civilians defining "nudum pactum" and setting forth the doctrine of "causa ciuilis." Truly court and counsel had been at a feast of jurists and philosophers and had stolen the scraps.

In *Frampton* v. *Gerrard,*[79] the court of chancery would not enforce a covenant to stand seized to the use of a bastard daughter because natural law did not recognize her. But it was said that if a conveyance had been made to her use, the mere intention to give to her would suffice to prevent a resulting use.[80] A similar question arose in *Fursaker* v. *Robinson.*[81] There was a covenant to surrender a copyhold to a bastard daughter, reciting a consideration of £300. There was no conveyance and the recital was a mere form. The court ordered the heir to convey. Plaintiff argued that there was causa, in the sense of a reason for enforcement, in the moral ground for making the gift. The defendant argued that, although there was a natural duty to provide for plaintiff, it had not been performed and she was now calling on the heir, on whom no such duty lay, to perform it. The whole question is argued by counsel and chancellor as one of what is required by natural law. It is assumed throughout that equity will treat a natural causa as a legal one.

Like notions are to be found in the old cases granting reformation where it amounts to specific performance. In *Taylor* v. *Wheeler,*[82] a debtor intended to secure a creditor, but did not make an effective conveyance. Reformation was sought after bankruptcy

76. Id. 308.
77. Id. 309.
78. "It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget and his desire that the land should continue in the blood and name of Baynton and the brotherly love which he bore to his brothers are sufficient considerations": id. 309.
79. 2 Rolle Abr. 785, K, pl. 4, 791, pl. 1 (1668).
80. "Although this is not a good consideration to raise a use by way of covenant, still it is sufficient upon a fine, for the will of the party is sufficient for this without consideration."
81. Prec. Ch. 175 (1717).
82. Salk. 449 (1710).

of the debtor. There was no common-law contract, but Lord Cowper said the land "was bound in equity" by the defective conveyance as a declaration of the debtor's will pursuant to his moral duty. In *Chapman* v. *Gibson*[83] the same question arose in a bill by a widow against her husband's heirs. The husband had devised all his lands to her, but had only copyholds, which did not pass and were not surrendered. The heirs were otherwise provided for. The Master of the Rolls decreed a surrender on the ground that where one made a gift on the basis or in the discharge of a moral or natural obligation equity would interpose. It will be noted how near this comes to the civilian's theory of a legal transaction. The declared intention is given effect as such if there is the causa of moral duty.[84] *Hardham* v. *Roberts*,[85] and *Tay* v. *Slaughter*,[86] where the same result was reached in favor of younger children donees as against the heir at law, and in favor of a charity, for which lands had been settled by a tenant in tail, as against the remainderman in fee, will suffice to complete the story. The latter case should be compared with what is said of the binding force of gifts to charity in "Doctor and Student."[87] Here there is a moral reason why the donor's intent should be carried out, namely, his moral duty to contribute to charity according to his means—an identification of the moral in its widest sense with the legal—characteristic of a stage of legal thought which would have made legal duties out of gratitude and of disinterested benevolence.[88] Perhaps there is also a certain idea of causa or consideration in the sense of some reason for making the promise or the gift. When made for pious or charitable uses, the donor had, as the Doctor puts it, "a spiritual benefit" in the way of providing prayers for his soul. This could be made to look very like a causa debendi.[89]

Such were the heterogeneous materials with which nineteenth-century equity built. Meanwhile the law had only just missed com-

83. 3 Bro. C. C. 229 (1791).

84. Compare *Biscoe* v. *Cartwright*, Gilb. Eq. 121 (1716), where the court refused relief in case of a defective surrender to the use of a will in favor of a wife otherwise provided for, there being no provision for the heir. Here there was no such moral duty to provide for the wife. It is instructive to note a like idea in Roman equity in the case of "bonorum possessio secundum tabulas": *Gaius*, II, § 119.

85. 1 Vern. 132 (1682).

86. Prec. Ch. 16 (1690).

87. Dial. ii, ch. 24.

88. See my paper, "The End of Law as Developed in Legal Rules and Doctrines," Harvard Law Rev., XXVII, 195, 217.

89. It should be noted that American courts of equity have enforced parol gifts of land to charity after part performance: *Beatty* v. *Kurtz*, 2 Pet. 566; *McLain* v. *School Directors*, 51 Pa. St. 196.

ing to the conclusion that no undertaking in writing and no business promise could be nudum pactum.[90] And though in the result a doctrine of giving effect to declared intention as such did not establish itself either at law or in equity, it is not to be wondered that it made headway in equity in the last century, when men were fascinated with Savigny's analysis of a legal transaction and the reigning philosophy of law regarded giving free scope and full effect to the individual will as the end of law. Moreover, the common law is restive under its doctrine of consideration and is not unwilling to get away from it by sophistical reasons or by invoking that word of many meanings "estoppel."[91] The feeling that a deliberate promise ought to be enforced simply as a promise will not down.[92]

I hold no brief for the will-theory of legal transactions. On the contrary, I should argue for a theory of enforcing the realization of reasonable expectations, in order to maintain the general security, and should contend that it meets the requirements of the law of torts better than the purely ethical doctrine of liability as a corollary of fault, and meets the requirements of the law of contracts better than the seventeenth-century doctrine of the inherent moral force of promises or the nineteenth-century doctrine of giving effect to the will. I should even contend that the Roman law of obligations is better explained on the same theory, and that nineteenth-century Romanists did violence to it when they stated it in terms of their theory of a legal transaction. But all this is another story. The doctrines of equity as to enforceable undertakings are a product of ideas of natural justice, philosophical theories of natural law, Romanist doctrines of causa, theories of the inherent force of promises, and theories of giving effect to the declared will, acting at different times in the minds of different chancellors, upon a substratum of none too clear doctrines of the common law. As things are in the modern world, a consistent carrying out of the will-theory would come much nearer to enforcement of realization of reasonable expectations than this hodgepodge. Apart from anomalies and uncertainties at law, the situation in equity in which the enforceability of an undertaking may depend on whether the

90. *Pillans* v. *Van Mierop*, 3 Burr. 1663 (1765).

91. *Ricketts* v. *Scothorn*, 57 Neb. 51; *Brokaw* v. *McElroy*, 162 Ia. 288; *Y. M. C. A.* v. *Estill*, 140 Ga. 291.

92. Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] A. C. 847, 855. Cf. Dean Wigmore's comments on *Schwerdt* v. *Schwerdt*, 235 Ill. 386 in ILLINOIS LAW REV., III, 461. And see *Hershey*, "Letters of Credit," Harvard Law Rev., XXXII, 1, 39.

promisee or donee can get into equity or must sue at law; in which a donee may be assured of his gift if the donor did not succeed in executing it, but not if he died before attempting to do so; in which there is a vital difference between "I give you" and "I hold in trust for you," one accomplishing nothing and the other doing its work completely; in which a sealed instrument is an enforceable contract on one side of the court and not, as a rule, on the other, and yet may be so enforceable sometimes, either of itself or with some added circumstance—this situation may well put us on inquiry whether and how long such a condition, in that part of our legal system which touches credit and commerce and our whole economic structure most immediately is to be endured. Let us remember that the absence of "general theories, good or bad," with which Sir James Stephen credited our law, was compared by him with the "pseudo-philosophy of the Institutes and the confusion of the Digest." Salvation by blundering and the beatification of muddle are no longer the accepted creed. The need for philosophical treatment of law in this country did not come to an end with Kent and Story.

THE CONFLICT OF INTERESTS LEGALLY PROTECTED IN FRENCH CIVIL LAW

By Joseph Charmont[1]

It is the principal function of the legislator, as well as of the judge, to adjust conflicts of interest. For the judge, the conflict presents itself as between two or more persons. He seeks to discover if the claim of the plaintiff is well founded, or if the justice of the case lies with the defendant. It appears, on the contrary, that the legislator who decides upon questions of general interest does not vote as between persons. There are, however, under the surface of these general interests, conscious and living beings which are the cause of them and which support the effect given to them by the laws.

If we should consider, for example, legislating concerning the great reserves of water power, we would quickly discover the necessity of taking account of a diversity of interests which must be conciliated. Thus, there are the riparian owners for whom the course of the stream may be a factor beneficial or harmful to agriculture; there are those interested in navigation, for whom the river is—to use the picturesque expression of Pascal—a moving road; and, lastly, there is the interest of manufacture for which the water is a force.[2]

It is extremely probable that of the various interests among which conciliation is most difficult, there will be found organs and groups arrayed in their defense. After all, the legislator has a

1. [Professor of law at the University of Montpellier, France. He is the author of "Le Droit et l'esprit démocratique," Paris, 1908; "La Renaissance du droit naturel," Paris, 1910; and "Les Transformations du droit civil," Paris, 1912. Professor Charmont has already been introduced to American readers through an American translation of the substantial part of his "La Renaissance du droit naturel" published in the volume of "Modern French Legal Philosophy," pp. 63-146, in "The Modern Legal Philosophy Series," Vol. VII, Boston, 1916. A learned and appreciative editorial preface by Arthur W. Spencer, Esq., in the translated volume last named, gives a comparative statement of Professor Charmont's position in legal theory. —ED.]

2. We may borrow another illustration from a work on administrative law (8th ed., p. 921) of a colleague, Berthélemy—"Three interests are today menaced by any arrangement concerning the exploitation of the sugar industry—the interest of producers, that of the manufacturers, and that of the refiners. The existence of sugar-growing colonies presents a fourth interest—that of the maritime carriers. In the domain of fiscal legislation there is nothing more harassed and changeable than tariffs on sugar."

mission very similar to that of a judge; but he acts from a wider point of view than the judge. We may, therefore, conceive the possibility of envisaging in their ensemble the importance and the opposition of interests legally protected. What this involves is to pursue this comparison as it appears historically. One would then have the scheme of the evolution of legislation.

It has been said, for example, that the Code Civil was essentially the code of the master, of the creditor, of the proprietor, and of the husband. What we are to understand from this is that the rights of these various persons were perpetuated and sanctioned. In the course of a century which has come to an end, the situation became appreciably modified. More and more consideration has been taken of the rights which are in conflict with those of the master, of the creditor, and of the head of the family.

We shall attempt to point out here and to explain the principal trends of this evolution.

I

The balance which in primitive times weighed on the side of the creditor has been raised. In the beginning the creditor could resort to the most rigorous methods of execution against his debtor.[3] In the course of the nineteenth century, physical constraint of the person became progressively weaker, and was definitely abolished in civil and commercial matters.[4] At the same time, legislation concerning bankrupts became less harsh; the forfeitures and penalties to which they were subjected were either abolished or reduced.[5]

What persisted longest was the blind respect of the principle of liberty of contract which, by reason of the inequality in the condition of the parties, often resulted in advantage to the creditor. If one of the parties is without a reserve, without savings laid by, is it not evident that he is compelled to submit to the conditions laid down by the other? There is no such thing as rescission on account of "lesion" in the matter of wages, or in a letting and hire contract ["location"], whatever may be the abuse of price. The law does not content itself in never opposing the economic injustice resulting from the fact that the creditor enjoys the more favorable situation; in certain cases it reinforces this situation by privileges and special favors. The lessor of immovables, for example, enjoys

3. V. *Henri Fontana*, "Des tendences actuelles à modifier la condition du debiteur": doctoral thesis; Montpellier, 1908.

4. Law of July 22, 1867.

5. Laws of March 4, 1889, and December 30, 1903.

the privilege of being satisfied before all other creditors out of the movables of the debtor which have been used to furnish the place rented. It is in this way that all the little bankruptcies are settled by turning over to the landlord all the realizable assets. Sometimes, even, we see the landlord, by virtue of the legal rules which make demandable the debts of the bankrupt, receiving in advance the entire amount of the rent and realizing an important benefit in the disaster of other creditors.[6] It was necessary to await a law not voted until 1872 to abolish this lien in case of bankruptcy. Since then other similar measures have been adopted.[7] The lien of the lessor of rural land has been cut down, and by an unexpected contrast the most favored creditor has all at once become the one most menaced. It is well known that in time of war the institution of the moratorium has everywhere almost made the payment of rent optional with the tenant.

What is, perhaps, most characteristic, is the importance of legislation regulating the relations of master and servant. The Code Civil had only two provisions on the hiring of services (articles 1780, 1781), the first of which was perfected in 1890, and the second of which was abrogated in 1868. This brevity seems all the more striking when we notice how this kind of an agreement is treated in more recent codes.

Of the difficulties which may arise between master and servant are those which concern questions of proof. How much are the wages? Of the wages due, has payment been made? Has not the servant already had payment on account? On all these points the Code Civil takes the declaration of the master. In default of a writing, the domestic may not offer proof, even by witnesses, in a sum under one hundred-fifty francs. The master was believed on his affirmation, on his own word. The chief reason for this preference was that the master inspired more confidence in the makers of the law than the servant. This solution, often criticized as anti-democratic and as putting a constraint on the principle of equality before the law, was put aside in 1868. Thenceforth, the relations of master and servant in matters of procedure came within

6. "Thus in the bankruptcy of a Parisian parcels-delivery, if we had in hand the amount to pay the landlord a rental of 55,000 francs per annum on a letting with still more than twenty-seven years to run, he would have received 1,500,000 francs. By investing this sum at 5 per cent he would obtain an annual and perpetual income of 75,000 francs, to be duplicated at the end of the term by his possession of the land"—*A. Boistel*, "Précis de droit commercial," No. 926, p. 663.

7. Laws of Feb. 19, 1889, concerning the lien of landlords of rural lands, and July 18, 1898, concerning farm leases.

the common law. When the hiring was concluded without any limitation of time, each party had the power of terminating the contract on principle at his pleasure, subject only to the condition of giving such notice as local custom required. The exercise of this power of discharge revealed numerous abuses. A commercial traveler or an assurance agent, after having built up a clientèle could be brusquely replaced. An employée of a company which had organized a pension fund and had stipulated in the regulations of the fund that dismissal of an employée terminated his rights in the fund, was exposed to the risk of being rudely discharged on the eve of the time when his pension could be claimed. The courts held in such a case that if the employer had observed the customary delay, the discharge of the employée did not subject the employer to damages. To remedy this situation, a law was enacted on October 28, 1890, modifying article 1780 of the Code Civil.

This amendment has been interpreted in the following way: the discharged employée may obtain damages if he can show that the dismissal was abusively given, that is to say, if it was not based on a legitimate ground. There is found here a new application of the theory of abuse of rights, and M. Poincaré was able to say in the Chamber of Deputies: "We are not in reality giving to the courts a new power; we are providing them with a more free, a more rational, and a more equitable scope of a power which they already have."[8]

The two provisions of which we have spoken were the only ones in the Code Civil which bore on the hiring of services. It was thought that the principle of liberty of contract ought to suffice for everyone. In the old organization of labor prior to the Revolution, there was a régime of absolute liberty. Each one could choose the work that suited him, to follow it at his own risk and peril. Labor was merchandise subject to the law of supply and demand. The workman asked the highest price, and the employer offered the least. Wages emancipated the laborer of the risks of his own enterprise, and, in revenge, the master was quit of him as long as the wages were paid. It is not our purpose here to inquire into what have been the results of this economic freedom. But the experience of nearly a century permits us to say that this liberty has, without doubt, increased in the most extraordinary proportions the production of wealth, though at the cost of untold suffering. Progress in scientific invention and the development of great industries have multiplied these sufferings. Concentration of capital has brought

8. Séance of Dec. 29, 1888: Annexe No. 3272, p. 813.

into existence enterprises employing thousands of workmen. Under these conditions, the isolated workman is unable to discuss the terms of his contract. He is obliged to accept whatever is imposed. In fact, the terms and duration of employment, fines, stoppages, and the rules governing payment of wages are fixed by the employer.

Experience has not lingered to demonstrate that the legislator is not able to remain indifferent in a similar situation elsewhere. This is the spectacle consequent on this economic anarchy, which has brought about progressive regulation, a system of legal protection for the workman. This regulation constitutes a legislation in process of formation; reforms are made successively, separately, and with difficulty. Often insufficient, they need much overhauling.

It is difficult to classify methodically all these reforms; but we may attempt to distribute them in three categories: first, those which deal with the regulation of the industrial situation, with the conditions and hours of work; second, those which have as their object the protection of wages; third, those which aim at relieving the workman of certain risks of his employment.

In order to understand the importance and the character of the regulation of labor, it will suffice to compare the situation of today with that which existed in the middle of the last century, or, more exactly, with the period before March 22, 1841, the date of the first labor law which dealt with the employment of minors in manufacturing industries.

Laborers were not able to concert together to discuss the conditions of their labor and to refuse to work. The liberty of organizing was recognized in 1864.[9] They were not permitted to form associations. The creation of labor syndicates was authorized in 1884.[10]

There was no regulation of the conditions and hours of employment. Today there are hygienic and prophylactic measures imposed on all industrial establishments; the supervision of labor is organized; and there is legislative protection of minors and women, which to a certain extent reaches also male adults. The first important attempt to extend protection to adults was the law of July 13, 1906, concerning a weekly rest-day.

As the regulations of employment form a considerable part of labor legislation, the laws concerning wages are of considerably less

9. Law of May 25, 1864.

10. Law of March 21, 1884, relative to the formation of professional syndicates.

importance. In general, with one unique exception,[11] the law has refrained from intervening in the fixing of wages; it has left this adjustment to the agreement of the parties. There is not found in the French code any provision comparable to that of article 138 of the German Civil Code, which declares void any usurious or oppressive contract and permits the judge to annul an agreement if he is of opinion that the master, profiting by the misfortune or embarrassment of the workman, has imposed insufficient salary conditions, or has otherwise taken oppressive advantage of his position. It may often be noted that municipalities and the state frequently impose on contractors of public works a scale of wages which represent a minimum, and which tend toward acceptance in other cases.

That which is hardest in the condition of the workman is insecurity. He is not sure to have work or to be able to work. If work fails him, if he is the victim of an accident, or if he is too ill or too old, how will he live? If he dies before his children are reared what will become of them?

The system of economic liberty throws all the risk on the workman. If he is industrious, capable, and fortunate he may in time become wealthy. If he is unfortunate or indolent, he will succumb in the struggle. His sole outlook then is public or private charity.

Most of the plans for socialism put all the risk in these matters on the state. The fundamental conception of contemporary socialism appears to be that of a state which organizes and remunerates labor, which makes work obligatory as military service is nearly everywhere, and takes under its care the aged, the infirm, and the young. Among these absolute systems, there are possible various adjustments and compromises. The tendency of our legislation is to alleviate the risks of the workman and to claim more of the employer and of the state.

At the present time, the workman is not able to count much except on his own efforts to find labor or to supply his needs. The labor unions are able to give assistance, but they have not in general the importance or the resources sufficient to relieve in case of stoppage of employment. In such case, it is difficult to ward off the evil by mutuality because all are afflicted at the same moment.

11. The price of fashion as applied to work in the home ought to be such as will enable a garment worker to gain in ten hours' work at least a minimum wage to be determined by the council of labor, or, in default of such a council, of a committee of wages for the trade or for the district—Law of July 10, 1915, Art. 7, concerning the wages of home workers in the garment trade.

Against such contingencies, the association of mutual help is, on the contrary, more effective.

Since the law of April 9, 1898, the risk of accident is, in principle, on the employer whenever the accident is caused by work or in the course of the employment. The law nullifies any agreement having the purpose of avoiding or abridging the employer's liability. To be relieved of this responsibility it must appear that the victim of the injury had intentionally caused it. The effect of gross negligence is simply to modify the amount of the indemnity—to diminish it, if it is attributable to the workman, and to increase it if it is attributable to the employer.

In conclusion, we may note the distribution among the state, employers, and workmen of the risks of old age and invalidation.

The law concerning superannuated workmen provides for a pension for all wage-earners. This pension is established by equal and obligatory payments made by the employers and the workmen. The state makes important additions to the fund by subvention. Under very nearly the same conditions there is provided a pension for invalidation for all workmen prematurely incapacitated.

Thus there continues an evolution, which can not be considered as completed, of the rights of workmen as against employers.

Analogous changes have come about in other fields of law. It would be easy to show how protection of the person of the child has been established as against the right of the father. The Code Civil had already laid down the principle that paternal power is established in the interest of the child. A series of laws has made precise the consequences of this principle.

We might also undertake to show the progress realized in the betterment of the condition of married women, but it is unnecessary to multiply examples. It seems to us more profitable to determine the order of preference of certain interests legally protected as they are found in conflict among themselves.

II

Who should have the preference when there is a conflict between the claims of the owner and a third person who has acquired in good faith?

It is important to note that in similar cases the French Code Civil and the jurisprudence of the courts allow the interests of credit to prevail over those of ownership. Mr. Sohm, who has made a comparison in this regard of the French Code Civil and the

German Civil Code, asserts as to this common feature in these codes: "the possessor in good faith appears to have first consideration. His interest is always considered as preponderant."[12]

As an application of this principle the rule may be cited that "in the matter of movables possession in good faith is as good as title."[13] When, for example, a seller in disregard of a sale already made resells and delivers a chattel to a second buyer the latter is regarded as having dealt with a non-owner. The ownership in effect had already been transferred to the first buyer by virtue of the contract; nevertheless, article 1141 of the Code Civil confirms the possession of the second buyer if he acted in good faith.[14] This solution appears to be demanded by the necessities of credit and of commerce in goods. The protection accorded to possession in good faith here outweighs the safeguards of property rights.

The same question is presented in cases which the statute has not expressly provided for, and it has been determined in the same way by the courts. For sixty years the French courts had recognized under certain conditions the validity of transfers and the creation of 'real' rights coming from an "ostensible" heir. An "ostensible" heir as contrasted with a true heir is one who is erroneously regarded as invested with a succession, or of a legacy which he is obligated later to restore. If such a person should agree to a transfer or the creation of a 'real' right, would it be good as against the true heir simply because of mutual and invincible mistake, in the same way that the good faith of third persons is effective to divest ownership? We may cite the notable and also especially characteristic decision of the civil branch of the Court of Cassation in the famous case of the Boussinière will.[15] When

12. *Rudolph Sohm*, "Le Code civil francais et le code civil allemand, Mémoire présenté au Congrès international de droit comparé de 1900," Paris, p. 8.

13. The observation must be made, however, that the rule "en fait de meubles possession vaut titre" is not found in the German Civil Code. In order to defeat the claim of the dispossessed owner this code requires two conditions—a juristic act and good faith of the possessor (B. G. B., 932). But in reality the differences between these two codes are less striking than one should have been tempted to suppose. The variances appear only in exceptional instances; see *Saleilles*, "De la Possession des Meubles en Droit français et en Droit allemand," 2éme étude, pp. 108, 187; cf. *Charmont*, in "Revue trimestrielle de Droit civil," année 1907, p. 49.

14. [Such also is the rule of the American Uniform Sales Act and of the English Sale of Goods Act—sec. 25.—ED.]

15. In this case, the ostensible heir had benefited through a fraudulent will forged by another. When the true heir got the proofs of the forgery he was put in possession of the goods of the estate. But in the meantime there had been transfers to, and the creation of 'real' rights in favor of, third persons dealing in good faith. Thus there was presented the ques-

the court was appealed to for decision on the question of the validity of the acts of the ostensible heir, it seemed to become engulfed in the ancient controversies from which there was no escaping again. The objections of M. Sarrut, then Advocate General, and now first president of the Court of Cassation, served to revive the discussion, but this discussion became, to put it correctly, a lawsuit of tendencies; it did not go much beyond the texts. We can not do more than turn to some of the doctrinal constructions upon which authors have supported their systems. The idea proposed by Demolombe, to regard the ostensible heir as the mandatory or agent of the true heir seems to be universally abandoned. Moreover, it must be acknowledged that the position was one especially difficult to defend. How can it be supposed that a man who has been unjustly dispossessed, who has resisted as far as he can, has been able, nevertheless, at the moment of losing his ownership, to give his adversary a mandate to represent him?

In reality, the court to support its judgment only invoked considerations of public welfare and the general interest; and the Advocate General in a note published in the collection of cases of Dalloz[16] has combated, if not the conclusions of the court, at least the merit, the convincing character, of these considerations. The problem takes on this aspect: two interests, that of ownership, and of freedom of commerce are in conflict. It is necessary to sacrifice one of these interests. Which one shall it be? This brings us to search out the secret thought of the law, and to attempt to disengage from a large number of cases a reason which may be preferred.

According to M. Sarrut the right of ownership ought to prevail—

> "The general tendency of our legislation is to place this right under protection against all harm . . .; the protection of the right of property essentially maintains public order . . .; our law does not provide for the ousting of an owner save in exceptional cases with determined limitations . . .; with these exceptions which are always justified by special reasons, the general rule resumes its dominion—'resoluto jure dantis, resolvitur jus accipientis'; there can not be conceded to the ostensible heirs rights any less fragile than even his title itself."[17]

The court has, nevertheless, maintained its old rule of decision and validated the claims of third persons in good faith through the ostensible heir. In accord with Sohm, the court thinks that our

tion of the validity of acts of an "ostensible" heir: see judgment of the Court of Cassation, Jan. 26, 1897: Pandectes français 1901, I, 209—note of J. Charmont.

16. 1897, 1, 33.

17. (1897) Dalloz, loco citato.

law is more favorably inclined toward the free circulation of goods than the conservation of ownership. In the French Code Civil as in the German Civil Code the dominant interest is that of free circulation. "The possessor in good faith appears to have first consideration. His interest is always considered as preponderant. The point of view of the security of transactions realized in good faith has been worked out with a marvelous technic. The interest of ownership yields before the interest of free circulation."[18]

The juristic interpretation seems to us to be in conformity with the spirit of our law; but in a legislative system truly equitable this solution ought to have a corrective. The possibility of representing a succession with reference to third persons may be made dependent on preliminary verification of the rights of the ostensible heir. This precaution has been taken in the German Civil Code by establishing a certificate of inheritance. The certificate is delivered on request, by the inheritance court after inquiry and a contentious procedure.[19] It is presumed that the person named in the certificate of inheritance is the true heir, and third persons acting in good faith may deal with him in entire security.[20] Furthermore, the right of the true heir ought not to be sacrificed without compensation if he was not in fault. When he is dispossessed, as in the case considered, as a result of judicial error, the injury which he sustained should be compensated by the state.[21]

III

Can it be said that the interest of third persons and of credit are always regarded as essential and as outweighing all others? This is not entirely exact. When there is a conflict between the interest of the family and that of third persons, the statute and course of decisions sometimes make the first point of view prevail over the second.

Thus, the adoption of the dotal régime which makes inalienable the dowry, may cause great loss to third persons who, during the

18. *R. Sohm*, op. cit. (note 12 supra).
19. B. G. B., 2384, 2360.
20. B. G. B., 2366.
21. The law of June 8, 1895, has made a first application of this idea of the responsibility of the state in case of a reversal of judgments in criminal cases. See, also, the modification made of the text of article 1384 of the Code Civil and the substitution of the civil responsibility of the state in place of that of the members of Public Instruction: law of July 20, 1899. We may, also, in conclusion, refer to the observations presented by M. Larnaude to the Society General of Prisons: Séance of October 18, 1899: Revue Pénitentiaire, 1896, p. 9.

marriage relation, have dealings with the spouses. This eventuality was all the more formidable, and difficult to avoid, since under the Code Civil there was nothing to reveal the marriage contract. Publicity of the contract has only been established in an incomplete manner, as by the law of July 10, 1850.

The decisions of the courts have themselves only reinforced the rigors and the dangers of the dotal régime by creating by the side of the inalienability of immovables, that of a dowry of movables, and by conceding that a judgment giving the power to alienate or mortgage a dotal immovable is an act of voluntary jurisdiction to which there does not attach the finality of a thing adjudicated. The validity of a transfer or of a mortgage, therefore, may be attacked, if it has been made by virtue of a judgment giving authorization to make the conveyance, in cases not provided for by law. Thus, he who purchases a dotal immovable, or who makes a loan by way of a mortgage upon such an immovable after the decision of a court of justice authorizing the wife to make a transfer or mortgage, does not in the meanwhile avoid all expectation of risk.[22]

But it is the time of the settlement of the dowry which reveals most clearly the preference of jurisprudence. It is known that an action borrowed from Roman law, the Paulian action, permits a creditor to impeach the acts of his debtor in fraud of his rights. The conditions of the exercise of this action depend on whether it is upon a valuable consideration or is gratuitous. If the transaction is based upon a valuable consideration, the creditor must show not only the fraud of the debtor but also the complicity of the third person who has dealt with him. If the transaction is gratuitous, the fraud of the debtor suffices; the creditor need not show that the third person had knowledge of the fraud. Then when the revocatory action is availed of against a dowry settlement tainted with fraud, it is important to know how this settlement ought to be characterized. Should it be regarded as a transaction upon valuable consideration or as gratuitous? On first view, there does not seem room for any doubt. No law obliges the settlor to furnish a dowry. It is given voluntarily, spontaneously; it does not require any exchange. The act is then gratuitous; and yet jurisprudence has in a decided manner assimilated the settlement of a dowry with acts upon valuable consideration. It has been determined that the

22. Cassation, Nov. 27, 1883; Sirey, 84, 7, 161.
Similar solutions have incurred the condemnation of the dotal régime: "It is a very sad thing," says Marcadé, "that a régime should require a human being to have more circumspection, more knowledge, and more intelligence of the law than the courts themselves"—Marcadé, VI, 1558.

settlement cannot be annulled unless the husband and the wife had knowledge of the insolvency of the settlor. It suffices that one or the other of the spouses acted in good faith, in order that the settlement may stand and that the action be defeated. Such a jurisprudence gives great security to the settlement of a dowry. In most cases, the financial embarrassment of the settlor is concealed from his own family, at least, from his future son-in-law. In spite of what is excessive in it, this jurisprudence corresponds pretty well with the idea which the middle class has generally of the dowry. One may be opposed to the practice of the dowry which has the grave disadvantage of multiplying marriages for money, but one can not disregard the fact that it is considered as a debt imposed by custom, as a moral obligation of the parents toward their children.

For the rest, this jurisprudence has aroused much hostile criticism; and it was thought at one time that it should be abandoned. A great commentator, M. Labbé has judged it severely. He says:

"The public interest and the stability of new families shall close the ears of justice from the complaints of frustrated creditors. Each generation will found its prosperity upon the ruin of those who shall have faith in the preceding generation. The progress is evident. The power of renouncing the paternal succession permitted the son to give a more free rein to his speculation with new elements. This was not unjust; but this was not enough. Now dowries established in bad faith rejuvenate and revive the family by abstracting past values which served as a pledge to creditors trusting too much."[23]

IV

From this brief outline we may attempt to state some conclusions:

1. The method which consists of opposing interests legally protected and of attempting to evaluate their respective importance brings us into contact with the reality; it has the advantage of setting off the true reason of decision, the "ultima ratio legis."

2. By prolonging this comparison in time we are best able to give an account of the progress and the changes which accompany it. We can trace the curve of its evolution.

3. The order and preference of the different protected interests among which conflict is possible may be stated as follows: in the first rank, the interest of the family; in the second, that of credit and the circulation of goods; and, lastly, that of property.

23. Cassation, Jan. 18, 1887: Sirey, 1887, part first, p. 97—note of M. Labbé.

HAS THERE BEEN JUDICIAL LEGISLATION IN THE INTERPRETATION AND APPLICATION OF THE "UPON CONSIDERATION OF MARRIAGE" AND OTHER CONTRACT CLAUSES OF THE STATUTE OF FRAUDS?

By George P. Costigan, Jr.[1]

From time to time the question of when the judicial function is properly exercised in the interpretation of statutes and of constitutions, and when it is not, comes up for consideration. A great deal has been said, for instance, about a changed attitude of the courts towards the Constitution of the United States—about "amendment by interpretation"—and also about the obsolete nature of that Constitution and about the need of expressly amending it and the state constitutions, or else of pro tanto superseding them, by "recall of decisions" or by some other relatively easy and theoretically effective but legal method. This "eighteenth century Constitution," as it has been called, has worried the courts and the public a great deal. There are statutes, too, that have worried the courts in a similar way. With more or less frequency it has been charged that such statutes, like the constitutions, have been given a spurious interpretation. Perhaps the most conspicuous of such statutes is the seventeenth century statute of frauds. Our federal Constitution has been called our eighteenth century Constitution just because it was framed in the eighteenth century by men who were familiar with very different problems of industry and government from those which confront us; but our seventeenth century statute of frauds is of course still older and likewise was framed by men who never dreamed of anything like the conditions of busi-

1. [Born July 19, 1870, at Chicago; A. B., Harvard, 1892, A. M., 1894, LL. B., 1894; LL. D., University of Nebraska, 1913; in practice, at Salt Lake City, Utah, 1894-9, at New York, 1899-1900, at Denver, 1900-05; instructor, 1900-04, professor, 1904-5, Denver Law School; professor, 1905-7, dean, 1907-9, College of Law, University of Nebraska; Professor of Law, Northwestern University, 1909—; Editor-in-Chief, Illinois Law Review, 1909-16. Professor Costigan is author of "American Mining Law," 1908, and "The Performance of Contracts," 1911; compiler of case-books on Wills, Mining Law, and Legal Ethics and has been a frequent contributor to the leading American and English law journals.—Ed.]

ness and the state of civilization with which we have to deal. Our eighteenth century federal Constitution has been given a varying interpretation, but so has our seventeenth century statute of frauds. The interpretation of the federal Constitution has a political aspect, however, which is lacking in the construction of the statute of frauds, and, accordingly, one who wishes to get a clear vision of the proper way to appraise the work of the courts in applying the federal Constitution will do well to endeavor to evaluate the work of the courts in applying the statute of frauds. An intelligent survey of the cases arising under the statute of frauds, in the light of what can be found out about the authorship and intent of the statute and about the social and business conditions which prevailed at the time of its enactment, should enable anyone to reach dispassionate conclusions in regard to the general problem of the proper interpretation of statutes and of constitutions.

The statute of 29 Car. II, c. 3, known as the statute of frauds, contained twenty-five sections, which may be arranged in five groups: (1) The conveyance sections (sections 1-3); (2) The contract sections (sections 4 and 17); (3) The wills and administration sections (sections 5, 6, 10-12, and 19-25); (4) The trust sections (sections 7-11); and (5) The judgment and execution sections (sections 10-11, 13-16, 18). Under this classification the only overlapping is found in sections 10 and 11, which provide that the lands of cestuis que trust shall be subject to execution levy and shall be assets in the hands of heirs, but that no heir shall be chargeable out of his own estate by reason of such assets.[2] While these two sections have to appear in three different groups, the classification is surprisingly simple.

Of these five different groups, the conveyance sections, the contract sections, and the trust sections, are very closely related. The wills and administration sections, and the judgment and execution sections (including the two trust sections, 10 and 11) relate to subjects that have received quite separate treatment since 1677, and all of those sections may be ignored in any discussion which deals in a general way with the distinctive provisions of the statute of frauds. As is said in substance in the preface to the first edition of Browne on "The Statute of Frauds," it is best to confine a treatise on or a discussion of the statute of frauds to—

2. It was early held that so far as execution levy was concerned this statute applied only to passive trusts. See *Ames*, "Cases on Trusts," 2 ed., p. 437, note.

"What appears to be generally understood as the domain of the statute of frauds, whether in reference to the English law or that of the several states, namely, the requirement of writing in proof of transactions which were previously capable of valid proof by oral evidence, involving the recognition, so to speak, of writing as a tertium quid in law, the establishment of a distinction between the two kinds of transactions, those effected by writing and those effected verbally, both of which the common law comprehended within the single term, parol."[3]

And, like the author of that well-known treatise, we shall find it "unavoidable to give decided prominence to the topic of contracts, as in itself possessing superior practical importance, and as being most perplexed by contradictory decisions."[4]

The statute of frauds was finally passed and received the royal assent on April 16, 1677,[5] and by its terms went into effect June 24, 1677. The inaugurator of the statute was Sir Heneage Finch, afterwards Lord Nottingham,[6] who at the time the first bill for the act, as well as each subsequent bill, was introduced, was the keeper of the Great Seal, and, as such, was the presiding officer of the House of Lords.[7] Lord Nottingham, however, admitted that after he introduced the bill for the statute into the House of Lords, it "received some additions and improvements from the judges and the civilians,"[8] and such very decidedly was the case. The bill for the act was several times introduced into the House of Lords, and on the committees appointed to consider the first two bills was the Earl of Shaftesbury[9] who was chairman of the first committee[10] and who had been Lord High Chancellor from Nov. 17, 1672, to Nov. 9, 1675. Later, to assist the committee of the House of Lords appointed to consider the last bill for the statute, the following judges were named: Justice Hugh Wyndham of the Common Pleas, Justice Thomas Jones of the King's Bench, Justice William Scroggs of the Common Pleas, and Sir Francis North,

3. *Browne,* "The Statute of Frauds," 5 ed., pp. v-vi.

4. Id. p. vi.

5. Journal of the House of Lords, XIII, 120.

6. *Ash* v. *Abdy,* 3 Swanst. 664.

7. The draft of the first bill for the statute introduced in the House of Lords on Feb. 16, 1674, new style, "is apparently in the careful handwriting of Lord Keeper Finch; the corrections upon it are undoubtedly in his hand."—"Ninth Report of the Royal Commission on Historical Manuscripts," part ii, p. 45.

8. *Ash* v. *Abdy,* 3 Swanst. 664.

9. Journal of the House of Lords, XII, 645, 659.

10. "Nothing was done by this committee beyond a formal meeting for adjournment."—"Ninth Report of the Royal Commission on Historical Manuscripts," part ii, p. 45.

Chief Justice of the Common Pleas.[11] But these judges were not the only ones responsible for the statute.

The first bill for the statute seems to have been the one introduced on Feb. 16, 1674, new style,[12] and a civilian judge and at least one common law judge who could have been consulted before and after that date must be deemed to have participated in the statute's framing. The civilian judge was Sir Leoline Jenkins, also known as Sir Lionel Jenkins, who was Judge of the Prerogative Court of Canterbury, who seems to have been particularly well versed in the canon law, who did not leave England on his foreign mission until December, 1675, or January, 1676,[13] and who on May 3rd, 1675, proposed certain articles as to nuncupative wills, which were adopted with modifications by the committee having the bill under consideration.[14] The common law judge was Sir Mathew Hale, the much praised Chief Justice of the King's Bench, whose learning and political influence must have compelled his consultation and who did not resign from office for ill-health until February 21, 1676. Sir Mathew Hale must be deemed to have had a part in the creation of the statute.[15] No doubt other civilians and judges also were consulted about the statute.[16]

---

11. Journal of the House of Lords, XIII, p. 45.
12. Journal of the House of Lords, XIII, p. 638.
13. *Wynne*, "Life of Sir Leoline Jenkins" (1724) p. xxvi.
14. "Ninth Report of the Royal Commission on Historical Manuscripts," part ii, p. 49. See Professor *Crawford D. Hening's* article on "The Original Drafts of the Statute of Frauds and Their Authors" in U. of P. Law Rev., LXI, 283, 295-6, 300-303, 316.
15. In his "Life of Francis North, Baron of Guilford," Roger North, the brother of Lord Justice North, says that Lord Chief Justice Hale "had the pre-eminence and was chief in the fixing" of the statute of frauds, but that Sir Francis North "had a great hand in" the statute and "the urging part lay upon him": *Roger North*, "Life of Francis North, Baron of Guilford," (ed. 1742) 109. The committee records show that Lord Justice North was the one who appeared before the committee and suggested changes and that many of the sections of the bill as drafted and as interlined were in his handwriting. See *Hening*, "The Original Drafts of the Statute of Frauds and Their Authors," U. of P. L. Rev., LXI, 283, 291-300, 314-316. His was indeed "the urging part," but, apparently, chiefly as the spokesman of Chief Justice Hale and the other judges. That the drafts of articles were in his handwriting would not prove his authorship. If he was the chosen spokesman of the judges who conferred about amendments, the amendments offered would naturally be in his handwriting even though suggested by others. There seems to be no sufficient reason for doubting the substantial truth of Roger North's statement of the part which Chief Justice Hale had in the statute's framing.
16. On Oct. 14, 1675, and after the second bill for the statute of frauds had apparently been sidetracked in the House of Commons, a third bill for the statute of frauds was introduced in the House of Lords and referred to a committee with the notation, "The Lord Chief Baron and Baron Littleton to assist their Lordships."—Journal of the House of Lords, XIII, 7, 20. While the "committee book" of the House of Lords shows that on Nov. 18, 1675, "My Ld. Chief Baron saith that he and Mr. Baron Littleton have perused

That the statute "had its first rise from" a keeper of the Great Seal, that a former custodian of the Great Seal sat on at least two of the committees of the House of Lords appointed to consider the bill for the statute, and that to Lord Nottingham, the father of the bill, to Sir Francis North, his judicial successor and one of the judges who assisted two of the committees appointed by the House of Lords to consider the bill, and to the House of Lords itself, as early as 1701 and before it could have lost as members all those who voted for the statute and understood its aims, fell the task of defining chancery's attitude toward the statute, are facts of some special practical significance. Throughout, it is of the first importance to remember that the statute is fundamentally a judge-inspired and judge-drafted statute.

But before we take up questions of construction there is one other matter to be considered. It is not enough to know the date and authorship of the statute and its main provisions. We must get more "atmosphere" if we are to interpret the statute properly. The title of the statute "An Act for prevention of frauds and perjuries" and its opening words "For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury, be it enacted," etc., tell us much. The prevention of perjury and subornation of perjury in connection with the groups of matters legislated about constituted the main purpose of the statute, and all its provisions are but the legislative means toward such prevention.[17] But when that is said not all is said that needs to be borne in mind in our discussion. The situation that existed in England when the statute was enacted must also be noted. Professor James Bradley Thayer frequently

---

the Bill and finde not a worde to be altered in it" (*Hening*, "The Original Drafts of the Statute of Frauds and Their Authors," U. of P. L. Rev., LXI, 283, 310; and see "Ninth Report of the Royal Commission on Historical Manuscripts," part ii, p. 66), those two judges may well have reported in that way because they were among the judges who helped get it in that final form as the second bill for the statute. Professor Hening says that the Lord Chief Baron was "probably Edward Turner, Knt., who, according to Dugdale, was made Chief Baron of the Exchequer, 23 May 1671": U. of P. L. Rev. LXI. at 310. Baron Littleton was Baron Timothy Littleton appointed to the Exchequer Feb. 1, 1670.

17. "The title of the statute states it to be 'An Act for prevention of Frauds and Perjuries.' In the recital, however, its object is expressed somewhat differently, as the 'prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury.' The latter phraseology is clearly the more accurate; for the statute does not aim directly to suppress fraud and perjury by imposing any new punishment in cases where they are proved to have been committed, but makes provision for excluding in certain cases such modes of proof as experience had shown to be peculiarly liable to corruption": Introduction, *Browne*, "The Statute of Frauds," p. vii.

expressed surprise at the novelty of the statute and its searching provisions and to him we are indebted for the suggestion that the statute of frauds owed its passage to the fact that in 1677 the rules of evidence as we know them were only slightly developed, that the law of new trials was in its infancy, and that in consequence it seemed to the statute's framers that only by taking away from the jury the oral contracts, leases, and wills, to which the statute of frauds applied, could much injustice be prevented. In his "Preliminary Treatise on Evidence," Professor Thayer said:

"There is reason to surmise that a leading motive in the enactment of that comprehensive but strange and very un-English piece of legislation, the statute of frauds, was found in the uncertainty that hung over everything at a period when the law of proof was so unsettled. It will be remembered that it was then a very critical time; that the attaint as an operative thing had vanished, while the law of new trials was in its infancy, and the rules of our present law of evidence but little developed."[18]

And at another place he pointed out that—

"The older law and the older decisions relating to 'certain subjects' were often mainly concerned in keeping matters out of the hands of juries. This motive . . . seems to have had its place in bringing into existence the English statute of frauds."[19]

The statute in the framing and passage of which Lord Chancellor Nottingham, ex-Lord Chancellor Shaftesbury, and Chief Justice North, afterwards Lord Keeper, played such a part was in the main aimed at juries. It was intended to take large numbers of cases from their consideration, because the law of proof of that day let too much that was apt to befog jurors go before them, because jurors were allowed to go too much on their private information in reaching their verdicts, and because in general the jurors' judgment of the truthfulness of witnesses—judgment which was not regarded as of the best—was not controlled either as to the merits or as to damages by the awarding of new trials to the extent that exists today. It was not a statute aimed at judges but rather one intended to assist judges—a fact which must not be lost sight of in considering the attitude of chancery judges toward the statute.

18. *Thayer*, "Preliminary Treatise on Evidence," 180. In a note he added: "I am inclined to the conjecture that like reasons helped to the enacting of 'An Act for Determining Differences by Arbitration': St. 9 Wm. III, c. 15, (1698)." On p. 170, Professor Thayer stated parenthetically that "the jury's right to go upon their private knowledge was emphatically recognized in 1670, and continued to be allowed in the books well on into the next century."

19. *Thayer*, "Preliminary Treatise on Evidence," 409-410.

And, as a statute aimed at juries, it had a far reaching effect. To quote Professor Thayer again:

"Courts of equity by the end of the seventeenth century, besides looking more freely at extrinsic facts, had begun to use a writer's extrinsic expressions of intention in a much freer way than courts of law. Adhering to the rule that extrinsic intention must not be used to displace or vary that of the writing, they nevertheless found many ways of using it, and even of using the direct oral expression of it. These courts, having no jury, had not before them, in listening to whatsoever evidence might help them, the apprehension so often expressed by the common-law judges that 'it is not safe to admit a jury to try the intent of the testator': Powell, J., in *Lawrence* v. *Dodwell,* 1 Lutw. 734, 1698.

"It must be remembered what such a fear at that period meant. Not yet had any distinct system of rules for excluding evidence come into existence. The power of judges to set aside verdicts as being against the evidence had begun to be exercised, but had not got far. The attaint was still the regular way of controlling the jury and this had practically lost its hold. The jury still held its old character and function, might decide on its own knowledge alone, and, if it heard evidence, might reject it all. This power of the jury and its exemption from fine and imprisonment for deciding against the evidence were vindicated in *Bushell's Case,* Vaughan, 135, in 1670.

"The statute of frauds, six years later, relieved against this state of things by requiring in a great many cases that there should be a writing or some other specific act or formality, before an action could be brought or a claim established. . . . After the statute of frauds —a very extraordinary enactment to have been passed by an English-speaking community in any age, so comprehensive is it and so far reaching—no jury could find a contract of the sort named in sec. 4, unless there were a writing; or one named in sec. 17, unless there were either a writing or one of the facts there specified; no jury could find a devise of real estate without a signature and witnesses, as required in sec. 5, or a will of personalty without writing, except under circumstances indicated in secs. 19 to 23. To the most important dealings of men the statute of frauds gave new security. It is not probable that so wide reaching an act could have been passed if jury trial had been on the footing which it holds today. And in construing the statute it was entirely natural that different ideas should prevail in the equity and the common law courts."[20]

That it was entirely natural we are apt to overlook today, even though we accept as too thoroughly settled to be shaken the decisions of most jurisdictions which in the part performance cases emphasize the difference in the attitude of the equity judges and of the common law judges towards the statute.[21] That difference

20. Id., 429-431.
21. See note 31, post.

may be stated in two ways, and I shall take as the exponent of one way Mr. Causten Browne, in his excellent treatise on "The Statute of Frauds," and as the exponent of the other, Professor Edward Jenks, in his recent "A Short History of England Law."

Mr. Browne's way of stating the attitude of courts of equity toward the statute of frauds is that—

"These courts, as has been many times affirmed by the wisest and most learned of their judges, are as much bound by the express provisions of the statute as [are] courts of law,"[22] yet "equity will at all times lend its aid to defeat a fraud, *notwithstanding* the statute of frauds."[23] At the same time the courts of equity "disclaim the power of engrafting exceptions upon the statute, but proceed upon the ground that to prevent fraud is their supreme duty as courts of equity and conscience."[24]

Professor Jenks' way of stating it is that—

"Generally speaking, though professing themselves not to be strictly bound by the words of the statute of frauds, equitable tribunals refused to enforce contracts for which the statutory evidence of writing required by that statute was not forthcoming. But if the defendant had fraudulently prevented the proper evidence being used, or had admitted in his pleadings the terms of the contract, or, if in reliance on the contract the plaintiff had incurred loss or liability in part performance of it, then a court of equity would decree specific performance; even though no action lay at law."[25]

As a practical matter it makes no difference whether Mr. Browne's view or Professor Jenks' view be adopted, for the court of equity will render the same decisions on either view, but from a theoretical standpoint—from the standpoint of one who desires to see a wholesome attitude of the courts toward legislation—it makes all the difference in the world whether a court of equity re-

22. *Browne,* "The Statute of Frauds," sec. 437.

23. Id., sec. 438.

24. Id., sec. 437.

In *Caton* v. *Caton,* L. R. 1 Ch. App. 137, 147, Lord Cranworth, L. C., said:

"The same clause of the statute [of frauds] which forbids the bringing of an action on any parol contract made in consideration of marriage also forbids the bringing of any action on any parol contract for the sale of land. But though courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it when to insist upon it would be to make it the means of effecting instead of preventing fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract."

25. *Jenks,* "A Short History of English Law," 217.

fuses to apply the statute of frauds, where it does so refuse, because it intends deliberately to disregard the legislative fiat in those cases where that fiat, if obeyed, would cause gross injustice, or whether it refuses to apply the statute in those cases because the legislature never intended the statutory provisions about contracts to apply in full force to courts of equity, but meant those courts to have the same freedom to do justice which was expressly given them in the trust provisions of the statute by the exception from the trusts required to be evidenced in writing of those trusts which "arise or result by the implication or construction of law."

But, it may be asked, if the 4th section of the statute of frauds was not meant to apply ex proprio vigore to courts of equity, why did not the statute say so? The historical explanation would seem to be clear, namely that those provisions were framed by Lord Nottingham and revised by judges of the common law courts who wanted chiefly to tie the hands of the jury without expressly referring to the jury, and who, besides, were so full of the idea that the statute would not apply ex necessitate to the chancery courts, that they neglected to be as explicit in the wording of the statute as they should have been.[26] Lord Campbell, who had only the general attitude of act-drawing judges in mind, said of Lord Nottingham and the statute of frauds: "If Lord Nottingham drew it, he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed."[27] It seems only fair to say of the equity judges who,

26. In the first draft of the statute of frauds, which constituted the bill introduced in the House of Lords on Feb. 16, 1674, new style, sections 4 and 17 of the statute, as we know it, did not exist, but a general contract clause was drawn to prevent a recovery of more than a certain amount "in all Actions upon the case, Actions of debt or other personal actions . . . upon any Assumpsit, Promise, Contract or Agreement made or supposed to be made by Parole, and whereof no Memorandum, Note or Memorial in writing shall be taken by direction of the parties thereunto . . . Provided that this Act shall not extend to such Actions or Suits which shall or may be grounded upon Contracts or Agreements for wares sold or money lent, or upon any Quantum Meruit or any other Assumpsits or promises which are created by the construction or operation of Law."—"Ninth Report of the Royal Commission on Historical Manuscripts," part ii, p. 48.

It should be noticed that this original clause was so worded as to apply to actions at law alone. It is at least arguable that the words "no action shall be brought," found in section 4 of the statute of frauds, were intended to be only a short summary of the statement as to actions at law in the original draft. If they were, section 4, both expressly and intentionally, applies to *actions* at law, but *suits* in equity are within it, if at all, not by legislative provision, but because chancery has voluntarily adopted the statute, though with reservations.

27. *Campbell,* "Lives of the Lord Chancellors," (Boston, 1874 ed.), Vol. IV, p. 228.

with the approval of the House of Lords given as early as 1701,[28] decreed performance of a partly performed contract which could not be recovered on at law because of the lack of the written evidence required by the statute of frauds, that if they did read into the statute what its framers privately intended rather than the meaning which they expressed, they may be deemed justified in so doing, since the private intent of the statute's judicial framers was doubtless the intent of Parliament.[29]

---

28. *Lester* v. *Foxcroft,* Colles' Cases in Parliament, 108 (1701).

29. In *Moore* v. *Stoddard,* 206 Mass. 395, 399, Sheldon, J., laid down the correct rule of statutory construction as follows:

"The manifest intention of the legislature, as gathered from its language considered in connection with the existing situation and the object aimed at, is to be carried out." See also *Holy Trinity Church* v. *U. S.* 143 U. S. 457.

With reference to the question of the way to ascertain the intent of the legislature, there is no unanimity of opinion. On the one hand, unwarranted speculation as to legislative intent must be avoided, as Lord Watson has pointed out:

"'Intention of the Legislature' is a common but very slippery phrase, which popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."—Lord Watson in *Salomon* v. *Salomon & Co.* [1897] A. C. 22, 38.

On the other hand, the court must look beyond the letter of the statute and interpret it in its spirit, and to enable the court to do just that the court must imaginatively recreate, as far as painstaking historical research will enable it to do so with exactness, the conditions confronting the legislature at the time of the passage of the statute. The proper emphasis of this latter point is found in the opinion in a recent Missouri case which has the advantage of quoting from an English opinion of 1584, which, antedating as it does the statute of frauds by nearly one hundred years, is itself part of the atmosphere through which that statute must be viewed. That Missouri case paragraph is as follows:

"At the outset of the discussion it will do to say that in the practical administration of the law, a cardinal canon of construction, steadily applied, is to get at the intendment of the law maker and enforce that intendment. To that end it is trite doctrine that we should consider the former state of law, the new provision, the evil sought to be removed, as well as the remedy provided, and so construe the law as to further the remedy and retard the evil. Such is a venerable rule of construction, none the less alive because old. In *Heydon's case,* 3 Coke 7a, it was quaintly and strongly put in this way: 'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: 1st. What was the common law before the making of the act. 2nd. What was the mischief and defect for which the common law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of

In Maitland's "Equity" it is said of contracts which come within section 4 of the statute of frauds that "the note or memorandum in writing is as necessary in a court of equity as in a court of law" with—

"one large exception, or apparent exception in the purely equitable doctrine of part performance. Equity would sometimes enforce an agreement which, owing to the absence of any written note of it, could not be relied on in a court of law. A bold step certainly was made here; but yet, perhaps, a necessary one. 'A' agrees to sell land to 'B'—there is no writing—he lets 'B' take possession of the land. What is one to do? Leave 'B' in possession though he had not paid the price? Allow 'A' to treat 'B' as a trespasser? Under the 17th section of the statute such a problem as this did not arise, for if the goods have changed hands, if even a part of the goods has changed hands, there is no need for the written note. It is a pity that the 4th section did not contain similar words. A court of equity in effect set itself to supply them."[30]

But is it a pity that the 4th section did not contain similar words to those in the 17th section? In view of the state of the law of proof and of the lack of control by courts of juries in the days when the statute of frauds was passed, a statute allowing actions at law on part performance would probably have had a bad effect, and as chancery promptly dealt with the statute of frauds as if it contained an exception in favor of specific performance after part performance the only advantage of an express exception as to chancery would have been to relieve chancery of any suspicion of deliberate misconstruction of the statute. But as we have just seen, the authorship of the statute relieves chancery of that suspicion anyhow.

The equity judge who is applying today in the specific performance cases the part performance doctrine that has seemed to so many of those who acquiesced in it to be deliberately contrary to the intent of the statute of frauds may not know that his action is in full accord with the intent of Parliament. It is not at all

---

the act pro bono publico.' "—Lamm. J., in *Decker* v. *Diemer, 229* Mo. 296, 324. See also *People ex rel. Wood* v. *Lacombe,* 99 N. Y. 43, 49.

"It may very well be that, in the condition of English jurisprudence in former times, when laws were few and rarely passed, when the business of legislation was confined to a small and select class, to which practically the judiciary belonged, when the legislative and the judicial bodies sat in the same place, and, indeed, in the same building—in such a state of things it may well be that the judiciary might suppose themselves to possess, that they might indeed really possess, a considerable personal knowledge of the legislative intent, and that they might come almost to consider themselves as a co-ordinate body with the Legislature."—*Sedgwick,* "Interpretation and Construction of Statutory and Constitutional Law," (2nd ed.) 205.

30. *Maitland,* "Equity," pp. 240-241.

necessary that he should, for he is no conscious wrong- or right-doer. He is no innovator, if he does not make of the part performance doctrine itself, sympathetically regarded, something that encourages rather than prevents fraud, and he has no responsibility for the part performance doctrine which came to him with its main features fully established. But for those of us who stop to reflect on whether, or perhaps rather on to what extent, the courts have legislated in reference to the statute of frauds, it is a satisfaction to know that it was never intended to tie the hands of equity nolens volens by section 4 of the statute of frauds.

It ought to be noted here that one who takes Mr. Browne's position that equity is as much bound by the statute of frauds as is a court of common law, and that, therefore, the contract provisions of the statute of frauds apply ex proprio vigore to chancery, must admit that equity regularly indulges in an infringement of the statute and must either advocate such infringement or else must argue for a restriction of the part performance and reformation of contract doctrines which will keep the court from interfering in oral contract cases, except where there may fairly be said to be a resulting or constructive trust within the eighth section of the statute of frauds.[31] A part performance found in change of possession, or in change of possession and partial or full payment of the purchase price, gives rise to no such trust and can be defended, with due regard to the proprieties, only on the theory that chancery was bound by the contract sections only ex voluntate or ex gratia; for while equity's action in recognizing change of possession as giving rise to a right to specific performance may be explained by the argument that section 4 of the statute was not meant to apply where livery of seisin or its modern equivalent, open change of possession, takes place,[32] the fact remains that such change of possession does not make the vendee or vendor liable at law on the contract itself, despite a plea of the statute,

31. In a few American jurisdictions, courts of equity refuse to read a part performance exception into the statute. "This court has repeatedly decided that a bill to enforce a parol contract for the sale of land cannot be maintained in this state, and that part performance will not take a parol sale of lands out of the statute of frauds. The statute contains no exceptions in regard to such contracts, and it is not for us to create exceptions where none exist in the statute."—Peyton, J., in *McGuire* v. *Stevens*, 42 Miss. 724, 732. "In four states the doctrine of part performance is wholly rejected. These states are Kentucky, Mississippi, North Carolina and Tennessee. But in at least two of those states the vendee under the oral contract may enforce in equity a lien for the purchase-money paid and for the value of his improvements, after accounting for rents and profits."—36 Cyc. 648.

32. See *Miller* v. *Lorentz*, 39 W. Va. 160.

and hence that the argument is an insufficient support. If change of possession has the effect in chancery to make the contract enforceable by at least one party and has no effect at law, then, since the wording of the statute and the reason for the chancery exception are general, the chancery exception can be defended only by saying that the law courts have been in error, which nobody has seen fit to contend, or that chancery was intended by parliament to make its own exceptions to the statute and did make good ones.

If, on the other hand, part performance is deemed to require not only change of possession, but the erection of valuable improvements by which the vendor will be unjustly enriched if a remedy is not allowed, and if the legal quasi-contract remedy is to be deemed inadequate, as under our feudally inherited view of land and its fixtures it is so to be deemed, the so-called specific enforcement of the oral contract may be defended as really the enforcement of a constructive trust, and as such expressly authorized to be enforced, despite the absence of writing, by section 8 of the statute of frauds. So the reformation of oral contracts required by the statute to be in writing may be defended under section 8, if the doctrine be confined to the case of contracts which, unreformed, would enrich the defendant, in that they give him more rights than it was in fact agreed that he should have, and to the case of conveyances under which the defendant actually was unduly enriched in that way. But if the reformation doctrine is to be carried farther, and contracts and deeds are to be reformed by compelling the insertion of property and rights omitted, relief in chancery can not be justified under section 8 and can be upheld only on the theory that chancery was not strictly bound by the statute and so could make an exception of mutual mistake, as well as of fraud, in applying section 4 of the statute, which in general it accepted and enforced; or else on the ground that after all these years "communis error facit jus."

But while the chancery courts have been reproached with violating the statute of frauds, the law courts have also been reproached with doing the same thing. Perhaps the most conspicuous instance of a reproach of that sort is found in connection with actions for breach of promise of marriage.

In the eleventh English edition of Best on "Evidence," it is said of the statute of frauds:

> "This statute has given rise to much litigation, and a high legal authority has stated to a select committee of the House of Commons that it must be allowed that some of the decisions under it are most

extraordinary. 'For instance,' observed that learned counsel, 'the statute of frauds says, among other things, that no action shall be brought upon any promise or consideration of marriage unless it be in writing and signed, and so on. Not long after that act was passed, an action for breach of promise was brought. Of course the consideration is, "in consideration of the defendant promising to marry the plaintiff, and the plaintiff promising to marry the defendant." The promise was by word of mouth in that case, and the question arose whether that came within the meaning of the act of Parliament, and the court decided that it did not, so the result has been that we have had those actions with which the public has been amused from time to time.'[33]

"It may be observed, however, that though the weight of the early authorities[34] is to the effect that the promise is not within the statute and need not be in writing, the first decision after the passing of the act is to the effect that it is within the statute and must be in writing. This case is *Philpott* v. *Wallet*,[35] in which it was resolved, upon objection taken that the statute must be intended of promises for payment of money upon marriages, that 'this promise is directly within the words and not out of the intent of the statute, because the promise is that in consideration the one would marry the other, the other would marry him, and therefore it is a promise in consideration of marriage.'

"It is treated however . . . as settled law that the promises need not be in writing, and not even the House of Lords, but only an act of Parliament, can be expected to unsettle this law. As we shall see presently, the evidence of the parties themselves was long inadmissible to prove the contract to marry, and Parliament, when in 1869 it made such evidence admissible, required corroboration of it;[36] but subject to that qualification the law is, that whereas writing is required to prove a contract to sell £10 worth of goods, the contract to marry, notwithstanding its enormous importance both to the spouses themselves and to third persons, may be proved by word of mouth alone—a state of things, too, which is perhaps prejudicial to the public."[37]

But it should be remembered that in 1677, when the statute of frauds was passed, there was very little real acquaintance with breach of promise actions at law or with perjury as one of their

33. See Evidence of the late Mr. Joseph Brown, K. C., before the Select Committee of the House on Acts of Parliament, which is reported in 1875: "Minutes of Evidence" Question 730.—Author's note.

34. See especially *Harrison* v. *Cage*, 1 Lord Raym. at p. 387.—Author's note.

35. (1682) 3 Lev. 65, Freeman 541; s. c. sub nom. *Philpott* v. *Walcot*, Skin. 24, per Windham, Charlton and Levinz, JJ.—Author's note.

36. Lord Denman's Evidence Act, 32 and 33 Vict., ch. 60, s. 2.—Author's note.

37. *Best*, "Evidence" (11th Engl. ed.) pp. 48-50. "It has been decided that an agreement between two persons to marry is not an agreement in consideration of marriage within the meaning of this enactment; but that these terms are confined to promises to do something in consideration of marriage other than the performance of the contract of marriage itself—a decision which shows how very cautious a man ought to be in pronouncing an opinion upon the construction of any statute."—*Smith*, "Law of Contracts," 59.

accompaniments. It was not until 1674 in the case of *Dickison* v. *Holcroft*[38] that it became finally established law, "despite the strenuous opposition of Chief Justice Vaughan"[39] that the action for breach of promise of marriage would lie when only mutual promises to marry were shown. To be sure, the same point had been ruled thirty-five years before in *Stretch* v. *Parker*,[40] and there were similar rulings after that case but during the Commonwealth;[41] but Vaughan, C. J., in dissenting in *Dickison* v. *Holcroft* makes light of the Commonwealth cases and treats *Stretch* v. *Parker* as a solitary decision.[42] In any event, the action at law was not established beyond challenge until after *Dickison* v. *Holcroft* and for practical purposes dates from that case.[43] In view

38. 3 Keb. 148 (April 28-29, 25 Car. II).

39. *Jenks*, "A Short History of English Law," 303.

40. 1 Rolle Abr. 22, sec. 20.

41. "Even after the Reformation, the proper remedy for the aggrieved swain [on an engagement to marry] was a suit in the spiritual court, 'causa matrimonii praelocuti.' Upon satisfactory proof of the facts, the spiritual tribunal would order the defendant to celebrate the marriage in the face of the Church, and even, if necessary, dissolve a marriage with another person contracted subsequently to the promise. But, in the fatal epoch of the Interregnum, when the Church courts were closed, and the Ecclesiastical remedy thereby suspended, disappointed plaintiffs began to resort to the secular tribunals, and to bring the action of Assumpsit, as on an ordinary contract. At the Restoration, there was some little hesitation on the part of the common law judges about recognizing the new action."—*Jenks*, "A Short History of English Law," 303.

42. "Vaughan, Chief Justice, for the defendant that this suit is only since Queen Elizabeth's time, but an absolute silence before, though the occasions of it were as great as ever, and no judgments of the late times are to be considered in regard then the thing itself was temporal, P. 14 Car. 1, *Stretch and Parker*, 1 Roll. 22, sec. 20 was a single judgment and multitudes thereof do not oblige so, but each Court must give judgment according to true inferences from the reason of the thing"—*Dickison* v. *Holcroft*, 3 Keb. 148, 148-149. The majority decided for the plaintiff on the ground of "the stream of authorities being this way."

43. It is therefore not true, as American judges usually assume it to be —*Derby* v. *Phelps*, 2 N. H. 515, 516; *Ullman* v. *Meyer*, 10 Fed. 241, 242; *Brick* v. *Gannar*, 36 Hun (N. Y.) 52, 53; *Lewis* v. *Tapman*, 90 Md. 294, 296— that prior to the statute of frauds breach of promise of marriage proceedings could be brought only in the Ecclesiastical Courts. With that correction, the following passage is of interest:

"A contract to marry was treated at common law, so Blackstone states, book 1, p. 433, 'in no other light than as a civil contract'; but it is in reality something more. Questions relating to marriage were from a very remote period cognizable only in the ecclesiastical courts, which had no authority to award damages, but imposed censures, as was supposed, for the welfare of the soul. It is curious and interesting to trace the conflicts between these courts and the common law courts, and, in a measure, the court of chancery, in the efforts of the last named tribunals to expand their jurisdiction, and correspondingly restrict that of the former over these contracts. This expansion gradually grew until the last remnant of the ecclesiastical court's jurisdiction was swept away by 20 and 21. Vict. c. 85, except as to the granting of licenses.

"As the ecclesiastical courts formerly possessed sole authority in questions relating to marriage (this was conceded by Lord Chief Justice Vaughan, 1 Carter C. P. 233), but as they had no power in cases of a breach of prom-

of the almost total lack of experience with the action at the time of the passage of the statute of frauds, it would seem that the final conclusion of the courts that the words "any agreement made upon consideration of marriage" in the fourth section of the statute of frauds were not meant to cover mutual promises to marry was sound. What makes that conclusion still more certain, is that we have the benefit of an opinion on the point by one of the known judicial collaborators on the statute. While Justice Hugh Wyndham or Windham, who was one of the judges participating in the decision of *Dickison* v. *Holcroft* and also one of the judges named by the House of Lords to assist its committee in the consideration of the third and last bill for the statute of frauds,[44] is reported by Skinner as deciding in 1682 in *Philpot* v. *Walcot*[45] in favor of the defendant and so as advocating the view that mutual promises to marry were within the statute of frauds, the report in Freeman of the same case sub nom. *Philpot* v. *Wallet* shows conclusively that he held in favor of the plaintiff.[46] Lord Holt later made Justice Windham's view prevail.[47]

ise other than to decree a performance of the marriage (Bac. "Ab.," Title, "Mar. & Div.," IV, 530), which jurisdiction was taken away by 26 Geo. II ch. 33, the common law courts, after the adoption of the statute of frauds in 1676 [1677], began to entertain civil actions for a breach of a contract per verba de futuro, and that jurisdiction Lord Chief Justice Raymond observed in 1733 'was a point not to be disputed': *Holt* v. *Ward Clarencieux*, 2 Strange 937. After considerable discussion it was finally adjudged that the two courts could not act concurrently, but that if an appeal were had to the ecclesiastical courts to compel a performance, the common law courts could not hear a suit for damages and so e converso. The suit at common law was at first greatly opposed because the party had his remedy in the Spiritual Court.

"But notwithstanding this, it was resolved that the party had his election of either remedy, and that by bringing an action at common law the remedy in the Spiritual Court was waived and released, 'for now,' as remarked by Lord Chief Justice Holt, 'in lieu of performance of the contract he shall recover damages': *Collins* v. *Jessot*, Holt's Rep. 458. * * * In the reign of Charles the First, the Court of Chancery evinced a disposition to assume jurisdiction to enforce the specific performance of the contract to marry, Tothill 124, as cited in *Camp.* "Lives of Lord Chan.," Vol. II, p. 138, but it does not appear that the power was ever exercised."—McSherry, C. J., for the court in *Lewis* v. *Tapman*, 90 Md. 294, 296-7.

44. Journal of the House of Lords, XIII, 45.

45. Skin. 24.

46. In 1 Freeman 541 the full report of the case is:

"Assumpsit upon mutual promises of marriage. The question was, whether it, being without writing, were not within the Statute of Frauds and Perjuries?

"Wyndham was of opinion, that it was not within the words nor meaning of the statute; because this promise is for the marriage itself, and not made in consideration of marriage for some collateral matter.

"But the other three judges were against him, that it was within the words, the meaning and the mischief of the statute, and as much a catching promise as any that the Act intended to prevent. Jud' pro def' Hil. 33, 34, Car. 2, Rot. 536."

47. In *Harrison* v. *Cage*, as reported in 1 Ld. Raymond, 386, 387-8, it is stated: "Note, it was ruled in this case at Norfolk Summer Assises last past

But with reference to the words "any agreement that is not to be performed within the space of one year from the making thereof," a different conclusion as to mutual promises to marry is possible. That subdivision of section 4 is a catch-all and may well cover mutual promises to marry as well as other contracts. When it comes to applying the statute of frauds provisions to contracts which Parliament could never have thought of because of the totally different conditions which have arisen, great care must in general be exercised; but in the case of the provision about agreements not to be performed within a year, the courts need not be very cautious as to the kinds of contracts within its terms. Maybe mutual promises to marry were not meant to be covered by it, but more of a showing is needed to establish that fact than is required to convince the investigator that they were not meant to be included by the "upon consideration of marriage" clause. The almost total lack of unfavorable or other experience with the breach of promise of marriage action at common law prior to the adoption of the statute is in so far evidence that mutual promises to marry were not among the contracts which the "not to be performed within the space of one year" clause of the statute was designed to hit. But in addition to the lack of more than the slightest practical experience with the breach of promise action prior to the enactment of the statute of frauds, there is the non-commercial and non-property nature of the contract to be considered. As was said by the Maryland Supreme Court:

"The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract; the relation it has in view is wholly distinct from the relation which any other contract could contemplate; the capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement; it can only be made between a man and a woman; it has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it. Why should a contract of this nature be placed in the same category with one for the

---

by Ward Lord Chief Baron, that this promise had no need to be in writing by the Statute of Frauds, 29 Car. 2, c. 3, s. 4. And Mr. Northey said at the bar, that the statute intended only agreements to pay marriage portions, and that it had often been ruled so by Holt, Chief Justice. Quod Holt non negavit." See also *Cork* v. *Baker*, 1 Stra. 34.

In many of the American statutes of frauds there is in the "upon consideration of marriage" clause, an express exception from the writing requirement of mutual promise to marry: *Stimson's* "American Statute Law," I, p. 460. But even in the absence of such express exception, such oral promises are deemed not to be within the statute of frauds. See *Clark* v. *Pendleton*, 20 Conn. 495; *Short* v. *Stotts*, 58 Ind. 29; *Withers* v. *Richardson*, 5 T. B. Mon. (Ky.) 94; *Wilbur* v. *Johnson*, 58 Mo. 600; Cf. *Morgan* v. *Yarborough*, 5 La. Ann. 316.

sale of goods or the performance of labor and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary business and dealings in trade and commerce? Sir Frederick Pollock observed in *Hall* v. *Wright*, E. B. & E. 793, 'I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind and is supported by no authority.' "[48]

The statute was not aimed at fraud or at perjury in general, but was designed to take from the jury the consideration of certain oral contracts as to which the judicial authors of the statute had found perjury to be frequent, and it seems only fair to say that a very decided presumption against including the engagement to marry contracts within the terms of even the "agreements not to be performed within a year" clause of the statute is found in the absence of any showing that the framers of the act knew of or contemplated perjury in connection with such contracts. Had they contemplated it, their failure to bring within the statute more engagements to marry contracts than those rare ones incapable of performance within a year would have been indefensible. The total lack of any reported English case on the point is also of significance in the consideration of the question of the omission of engagement to marry contracts from the statute, for that silence of the English courts would seem to indicate that in England bar and bench alike regard such contracts as wholly without the operation of the statute. English lawyers seem to have felt and to feel that since the consideration of marriage clause does not cover mere engagements to marry such contracts were not intended to be included in any clause of the statute of frauds.[49] The present writer

48. McSherry, C. J., for the court, in *Lewis* v. *Tapman*, 90 Md. 294, 300; 47 L. R. A. 385. But in *Derby v. Phelps*, 2 N. H. 515, it is said that an engagement to marry not to be performed within a year "comes within the very teeth of the statute."

49. A learned editor, however, has made the opposing suggestion that the absence of English cases "may be due to the fact that no good lawyer in England ever had the temerity to raise such a question" as the non-application to engagement to marry contracts of the "agreements not to be performed within a year" section of the statute. See an article by Mr. *A. H. Robbins*, Central Law Journal, LXX, 420, 424. The error of that conclusion is shown by the following passage from a leading English writer's recent book: "At length, in *Dickison* v. *Holcroft*, 3 Keb. 148, decided in 1674, the Court of King's Bench, [Common Pleas] despite the strenuous opposition of Chief Justice Vaughan, held the action, even when founded merely on mutual promises, to be good.

"Almost immediately after this decision, the new action was threatened from two quarters by the provisions of the statute of frauds. Was it founded on an 'agreement made upon consideration of marriage' or was it an 'agreement that is not to be performed within the space of one year from the making thereof'? In either case, it was not actionable unless written evi-

is inclined to believe that the doctrine that such contracts are wholly without the statute of frauds is the sounder. The American cases on the point are in conflict.[50]

Before the subject of engagements to marry and contracts in consideration of marriage is dismissed, a word ought to be said about the application of the "part performance" doctrine to contracts in consideration of marriage. By the great weight of authority the occurrence of the marriage under a contract upon consideration of marriage not evidenced in writing as required by section 4 of the statute of frauds is not part performance within the rule about part performance in equity,[51] yet the question whether

---

dence was forthcoming. The last alternative was not seriously discussed, but it seemed at first a strong thing to say that an action on a breach of promise to marry was not an 'agreement made upon consideration of marriage.' Lord Holt, however, appears to have taken a decided view, that the statute only 'intended agreements to pay marriage portions': *Harrison* v. *Cage* (1698), Ld. Raym. 386; and in effect, after a little hesitation, it was clearly decided, that its provisions did not apply to mutual promises to marry."—*Jenks*, "A Short History of English Law," 303.

50. That mere engagements to marry not to be performed within a year are not within the "not to be performed within a year" clause of the statute of frauds, see *Brick* v. *Gannar*, 36 Hun 52; *Lewis* v. *Tapman*, 90 Md. 294. That they are within it, see *Derby* v. *Phelps*, 2 N. H. 515; *Nichols* v. *Weaver*, 7 Kans. 373; *Ullman* v. *Meyer*, 10 Fed. 241. For cases of interest in which a decision of the point was avoided, see *Clark* v. *Pendleton*, 20 Conn. 495; *Paris* v. *Strong*, 51 Ind. 339; *Blackburn* v. *Mann*, 85 Ill. 222; *McConahey* v. *Griffey*, 82 Ia. 564; *Lawrence* v. *Cooke*, 56 Me. 187; *Wilbur* v. *Johnson*, 58 Mo. 600; *Barge* v. *Haslam*, 63 Neb. 296; *Corduan* v. *McCloud*, 87 N. J. L. 143; *Clark* v. *Reese*, 26 Tex. Civ. App. 619, 64 S. W. 783.

In *Ullman* v. *Meyer*, 10 Fed. 241, the court discusses the effect of the express statutory exception of mutual promises to marry from the New York "in consideration of marriage" clause of the statute of frauds and concludes that "if it had been intended to exclude promises of marriage altogether from the operation of the statute, it could have been plainly evinced by inserting the exception where it would naturally apply to all the classes of promises required to be in writing" (p. 243) and that, since the intention to exclude such promises from the statute was not so evinced the exception contained in the "in consideration of marriage" clause must be limited to that clause.

51. The cases are too numerous to make it worth while to cite many. See 36 Cyc. 648-649. The cases make no distinction between promises about property coupled with and part of the mutual promises to marry and promises contained in contracts made between the engaged persons or others after the engagement to marry. In either event marriage is not deemed part performance within the chancery doctrine of that name. See *Caton* v. *Caton*, L. R. 1 Ch. App. 137; *Montacute* v. *Maxwell*, 1 P. Wms. 618; *Dundas* v. *Dutens*, 1 Ves. Jr. 196; *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Bradley* v. *Saddler*, 54 Ga. 681; *Richardson* v. *Richardson*, 148 Ill. 563; *Flenner* v. *Flenner*, 29 Ind. 564; *Fraser* v. *Andrews*, 134 Ia. 621; *Ogden* v. *Ogden*, 1 *Bland* (Md.) 284; *Day* v. *Roby*, 77 N. H. 144; *Manning* v. *Riley*, 52 N. J. Eq. 39; *Watkins* v. *Watkins*, 82 N. J. Eq. 483; *Brown* v. *Conger*, 8 Hun (N. Y.) 625; *Hunt* v. *Hunt*, 171 N. Y. 396; *Finch* v. *Finch*, 10 Oh. St. 501; *Henry* v. *Henry*, 27 Oh. St. 121; *Adams* v. *Adams*, 17 Ore. 247. Occasionally marriage, usually when coupled with other things, is deemed full performance and takes the contract out of the statute both at law and in equity. See *Weld* v. *Weld*, 71 Kans. 622; *Supreme Lodge of Knights of Pythias* v. *Ferrell*, 83 Kans. 491;

that doctrine is sound is not easy to answer. The matter is discussed in Browne on the "Statute of Frauds," as follows:

"It would certainly seem that where a party to whom a marriage portion has been promised, actually enters into the marriage upon the faith of the promise, this is such a change of condition on the faith of the agreement as answers all the requirements of courts in decreeing specific performance. But it appears to be firmly settled that the mere marriage will not be sufficient. This, as Judge Story says, is at variance with the rules governing other cases of contract, and is to be treated as a peculiar case standing on its own grounds;[52] and Vice Chancellor Malins has expressed his regret that such an exception was ever made.[53] The argument in favor of it has been that 'marriage is necessary to bring the case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity,'[54] and that such agreements are always performed before they become subjects of judicial consideration, and so no case would ever be within the statute, if marriage were held to be part performance.

"But is this so? Suppose [that prior to the Married Woman's Separate Property Acts] a woman agrees to marry a man, on the faith of his promise to settle her property to the use of her own family; both sides of the contract executory; and the woman marries him; it is hard to see why the principle of part performance as a doctrine of equity should not cover the case. In a case in the House of Lords,[55] where the old rule that marriage was not part performance was in terms (though unnecessarily) reasserted, Lord Cottenham used language very forcible showing the equitable ground for the contrary opinion. He said: 'The principle of equity is this: if a party holds out inducements to another clearly and deliberately, and the other consents and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed and will give effect to the proposal.' "[56]

As far as the logic of Lord Cransworth's argument in *Caton* v. *Caton* that "marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute

---

Harlan v. *Moore*, 132 Mo. 483; *Dygert* v. *Remerschnider*, 32 N. Y. 629; *Adams* v. *Swift*, 155 N. Y. Suppl. 873; *Flowers* v. *Kent*, Brayton (Vt.) 238; *Child* v. *Pearl*, 43 Vt. 224. Cf. *Blackwell* v. *Blackwell*, 196 Mass. 186.

52. "Eq. Juris.," sec 768.—Author's note.

53. *Ungley* v. *Ungley*, 4 Ch. Div. 73. See also remarks of same judge in *Coles* v. *Pilkington*, L. R. 19 Eq. 174.—Author's note.

54. [Lord Cranworth in] *Caton* v. *Caton*, [L. R. 1 Ch. App. 137, 147.]—Author's note.

55. *Hammersly* v. *DeBiel*, 12 Cl. & Fin. 45.—Author's note.

56. *Browne*, "The Statute of Frauds" 5 ed., sec. 459. For an American case of specific performance in case of fraud, see *Peek* v. *Peek*, 77 Cal. 106. See note 68, post.

would be a palpable absurdity,"[57] is concerned, it is only necessary to say that in England "the doctrine of part performance has no application except to contracts for land,"[58] and that, consequently, even if marriage should be deemed part performance where the contract was to settle real property there would still remain within the English statute all contracts for the settlement of personal property upon consideration of marriage.[59] It is not palpably or otherwise absurd to say that marriage is as momentous or irrevocable a step as the taking of possession of the real property and the erection of valuable improvements thereon and should be deemed by a court of equity as just as sufficient a reason for regarding

57. *Caton* v. *Caton*, L. R. 1 Ch. App. 137, 147. See *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Coles* v. *Pilkington*, L. R. 19 Eq. 174.

In *Dundas* v. *Dutens*, 1 Ves. Jr. 196, 199 (1790) Lord Chancellor Thurlow said: "If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner."

"The reason of this provision in the statute was to prevent those unguarded expressions of gallantry and improvident promises thoughtlessly made, or artfully procured during courtship, being *perverted* into deliberate and solemn engagements, conferring a right to compel performance."—Gaston, J., in *Dunn* v. *Tharp*, 39 No. Car. (4 Ired. Eq.) 7, 8.

In *Adams* v. *Adams*, 17 Ore. 247, 254-5 (1889) Thayer, C. J., said:

"The agreement alleged in the complaint, that the respondent William Adams agreed with the appellant to give her the use of the premises for her home during her life in consideration of her marrying him rests in parol; and if proved as alleged, I do not see how, in view of the statute, we could hold that it was valid. The appellant's counsel contends that it was sufficiently performed to take the case out of the statute; but no performance is shown, aside from the fact that the parties actually intermarried, and cohabitated as husband and wife, and that of itself is not sufficient.

"We are not authorized to construe the statute as though it read in effect that an agreement made in consideration of marriage is void, unless the same is in writing, or *unless the parties actually consummate the marriage*. It was not intended to mean that; but was intended to mean that all antenuptial agreements concerning settlements, advances, and other pecuniary matters, made upon consideration of marriage, should be reduced to writing in some form, in order to prevent fraud and perjuries. A party has a right to interpose the statute as a defense in all such cases, unless he has given countenance to the performances of acts by the adverse party upon the faith of the agreement of such a nature that the latter would be materially injured if the agreement were not carried out. In the latter case, a court of equity, to avoid a fraudulent use being made of the statute, will enforce the performance of the agreement. But acts done prior to the agreement, acts merely preparatory or ancillary to the agreement, such as delivering abstracts of title, measuring the land, drawing up deeds, etc., marriage alone, payment of the price in whole or in part, do not constitute a part performance within the doctrine (*Pomeroy's* "Eq. Jur.," sec. 1409, note 1)."

58. *Browne*, "The Statute of Frauds," 5 ed., sec. 460 a, citing *Britain* v. *Rossiter*, 11 Q. B. Div. 123; *Maddison* v. *Alderson*, 8 App. Cas. 474. But see *McManus* v. *Cooke*, L. R., 35 Ch. D. 681.

59. Accordingly, Lord Chancellor Cottenham's statement in *Lassence* v. *Tierney*, 1 Mac. & G. 551, 572, that "if marriage be part performance, every parol contract followed by marriage would be binding" overlooks the personal property contracts which chancery will not enforce specifically.

the contract as thereby taken out of the statute; and, therefore, as long as the statute has full operation on oral contracts in consideration of marriage calling for the settlement of personal property, it is not absurd to deny its application to such contracts as call for the settlement of real property and have been partly performed by marriage.

But when that is said, the matter is not settled. The question is, after all, one of legislative intent and it is by no means as simple as has been supposed. An analysis will make this clear.

It seems sound to distinguish three kinds of contracts to which the "upon consideration of marriage clause" might logically be deemed to apply.

1. Mere mutual promises to marry.

2. A promise to settle property in consideration of and upon the marriage made by a third person to one or both of a couple already engaged to marry, or made by one of the already engaged couple to the other, or made by third persons—as, for instance, the parents of those about to marry—to each other conditioned upon the marriage.

3. A promise by one party to marry the other in consideration of that other's promise to marry, and to convey or devise property to, the first party, there being between the parties no antecedent engagement.

The first kind of contract—mere mutual engagements to marry—we have already discussed sufficiently. Logically the language of section four of the statute covers that kind, but it seems fair to say that the legislative intent was not directed toward such contracts.

The second kind of contract, however—the promise for a marriage settlement—was, of course, within the legislative intent. In a country where marriage settlements are and have been as common as in England, that would, of course, be so. It was the very kind of promise at which the "upon consideration of marriage" clause, as framed by the English Parliament, was directed. Parliament was legislating not merely for the exceptional marriage settlement contract which related to personal property only, but also for real property marriage settlement contracts. Indeed, in England, at the time of the enactment of the statute of frauds, most marriage settlements, and so most contracts for marriage settlements, doubtless related to realty. If the statute of frauds applied to chancery, therefore, the doctrine that marriage is part performance could not be enforced as to contracts for real property mar-

riage settlements without taking out of the statute the great majority of marriage settlement contracts, since the great majority of such contracts both related to realty and were in any event unenforceable unless followed by marriage, and thereby defeating the legislative intent. If, on the other hand, the statute of frauds did not apply to chancery, except in so far as chancery saw fit to apply it, the doctrine that marriage is part performance, though logically possible in the case of such contracts, would seem unadvisable because due deference to the legislatively declared policy should make chancery "follow the law."

In many American jurisdictions the statute of frauds question in regard to such contracts may often never arise, because the third person's promise to one about to marry is without other consideration than the promise to marry or the actual marriage and because of the doctrine in those jurisdictions that promising to do, or doing, what one is already bound to the promisor or to a third person to do is no consideration; but in those jurisdictions where consideration is deemed to exist in such case—as in England[60] and in New York[61]—marriage probably cannot fairly be deemed part performance to take this second kind of contract out of the "upon consideration of marriage" subdivision of the statute. It is only where there is, in addition to the marriage, something which constitutes part performance under the real property subdivision of section four of the statute, that it seems fair enough for equity to enforce the contract for a real property marriage settlement despite the marriage feature,[62] for even if the statute applies to chancery, such part performance doctrine as to realty contracts was apparently an established doctrine when the statute of frauds was passed and was probably not intended to be prohibited by even the "upon consideration of marriage" clause.

The third kind of contract—that of mutual promises to marry plus a promise by one party, as part of the engagement, to pay money to or to convey to or settle property on the other—may not have been a kind which the English thought of when marriage settlement contracts were mentioned or contracts "upon consideration of marriage" were discussed. Such a contract was and is only one

60. *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159, 30 L. J. C. P. 145. See *In re Broadwood*, 56 Sol. J. 703.

61. *De Cicco* v. *Schweizer*, 221 N. Y. 431.

62. *Pomeroy*, "Specific Performance," 2 ed. § 133. See *Ungley* v. *Ungley*, L. R. 4 Ch. D. 73; *Surcome* v. *Pinniger*, 3 DeG. M. & G. 571; *Sharman* v. *Sharman*, 67 L. T. 834; *Neale* v. *Neales*, 9 Wall. 1; *Dugan* v. *Gittings*, 3 Gill. 138; *Nowack* v. *Berger*, 133 Mo. 24. But see *Henry* v. *Henry*, 27 Oh. St. 121; *Hart* v. *Hart*, 3 Desaus. 592.

species of mutual promises to marry, and as such may not have been meant to be hit by the statute of frauds. Logically it is as easy to assimilate such a contract to a marriage settlement contract as it is to class it with mere engagements to marry, just as logically it is necessary to admit that mutual engagements to marry are contracts "upon consideration of marriage"; but logic does not determine the matter of legislative intent.

When one asks what Parliament intended by the "upon consideration of marriage" clause of section four of the statute of frauds, and in asking the question bears in mind English customs and judicial experience, he seems bound to say that the literal meaning of the "upon consideration of marriage" language is not controlling and that, as a matter of legislative intent, it may be doubted if mutual engagements to marry were within those words, whether such engagements were merely mutual promises to marry or were such promises with additional promises about property. By the "upon consideration of marriage" clause, Parliament may not have meant to hit any kind of engagement to marry, whether mere mutual promises to marry or such promises complicated with promises about property,[63] entered into between the parties to the prospective marriage and between them alone. Unfortunately we have practically no evidence of what Parliament intended, and viewing the "upon consideration of marriage" clause in the light of our very different American customs, our American courts have said that the statute of frauds applies to this third class of contracts.[64] Mr. Browne, in his valuable treatise on the "Statute of Frauds" sympathizes with the American interpretation. He says:

"It appears to have been once considered that the statute [of frauds provision about agreements upon consideration of marriage] applied only to these cases of marriage settlements properly so called,[65] but it is now settled, at least by American authority, that it is not so limited, but extends to any agreement to undertake any duty or office in consideration of another's contracting a marriage, whether with the promisor or with a third person. The sole exception found to

63. But see *Caton* v. *Caton*, L. R. 1 Ch. App. 137.

64. See *Bradley* v. *Saddler*, 53 Ga. 681; *Hunt* v. *Hunt*, 171 N. Y. 396; *Finch* v. *Finch*, 10 Oh. St. 301.

Where, as in New York, and many other American states (*Stimson's* "American Statute Law," I, p. 460) the statute requires a writing for promises "made in consideration of marriage, except mutual promises to marry," it is comparatively easy to supply the word "mere" before the words "mutual promises to marry," and so to regard the third class of contracts above discussed, as well as the second class, as within the statute. See *Ennis* v. *Ennis*, 48 Hun 11.

65. *Harrison* v. *Cage*, 1 Ld. Raym. 386.—Author's note.

this general rule is that mutual promises to marry are not covered by the statute."[66]

While he does not say so in so many words, it seems clear that Mr. Browne would regard, as the American courts seem to do, a contract upon consideration of marriage as formed where "B" says to "A," "If you will promise to marry me, I promise to marry you and to convey Blackacre to you [or to pay you $10,000.00] immediately after our marriage," and where "A" promptly answers, "I promise." If that is such a contract, then unless the marriage takes place no action at law or in equity can be maintained on the oral contract, or at least not on that part of it relating to Blackacre [or the $10,000.00], in the face of a plea of the statute of frauds[67] and Mr. Browne's theory, therefore, would let the "upon consideration of marriage" clause of section 4 of the statute of frauds operate on all such oral contracts prior to part performance, as, for instance, where "B" marries "C" or otherwise refuses to marry "A."

66. *Browne,* "The Statute of Frauds," 5 ed., sec. 215a.

67. Whether the statute of frauds could apply to the Blackacre or the $10,000 part of the contract, and not to the mutual agreements to marry, would depend on whether the court could treat the offer as an offer of two contracts, one of engagement to marry only (and therefore bilateral) and the other of settlement to be earned by marriage (and therefore unilateral) and could further find a consideration for the second (the unilateral) contract where, in marrying "B," "A" simply did what by the first contract she was bound to do. If the statute did apply to the Blackacre or the $10,000 part only, and not to the mutual promises to marry, could the Blackacre or the $10,000 part be considered by the jury in measuring "A's" damages in an action by "A" against "B" for breach of promises of marriage?

In *Cushman* v. *Burritt,* 14 N. Y. Weekly Dig. 59 (1882), the General Term of the New York Supreme Court decided a case of breach of contract on the part of defendant to marry the plaintiff and to give her $2,000 if she would marry him, to be paid before the marriage. It appeared that when the defendant asked the plaintiff to fix the time for the marriage she refused to marry him until he paid her the two thousand dollars, and when he declined to do that she refused outright.

"Held that as the alleged contract was something more than a mutual promise of marriage it was void by the statute of frauds, unless it was in writing * * *

"Held further that the plaintiff cannot abandon so much of the contract as is within the statute and recover on the breach of the promise to marry, for the contract is entire, and a party is not permitted to separate the parts of an entire agreement and to recover on one part, the other being void: 5 Cow. 162; 31 N. Y. 537." Neither of these holdings was necessary to the decision, however, in view of the fact that the court held that plaintiff did not furnish proof that she was ready and willing and had offered to perform and so did not prove that defendant was in default. Moreover, the New York Court's conclusion was facilitated by the wording of the New York Statute of Frauds (see note 64, ante). Nevertheless, the New York Court's conclusions would probably receive unanimous American judicial approval. For instances of contracts to marry and to settle property held indivisible, see *Caylor* v. *Roe,* 99 Ind. 1 (Cf. *Davis* v. *Cox,* 178 Ind. 486); *Chase* v. *Fitz,* 132 Mass. 359; *Henry* v. *Henry,* 27 Oh. St. 121. See *Wesley* v. *Wesley,* 181 Ky. 135, 145; *Fischer* v. *Dolwig* (No. Dak.), 166 N. W. 793.

If, however, the American courts and Mr. Browne are right in considering this third class of contracts within the "upon consideration of marriage" clause, then, as to that class, the argument of Lord Cranworth against marriage as part performance becomes itself a palpable absurdity. His argument was that "marriage is necessary to bring a case within the statute and to hold that it also takes the case out of the statute would be a palpable absurdity." But in this third kind of contract, a *promise* to marry plus a promise to pay money or convey property is all that is necessary to bring a case within the statute, that is, the case is within the statute though marriage never takes place. Unlike the second class of contracts, it can be broken by the one who promises to settle property even if the marriage never takes place, and at the same time, in the view of the majority of American courts, is within the statute of frauds before marriage. It is, therefore, not absurd to say in America that marriage should be deemed part performance in this third class of cases.[68] The very doubt as to whether Par-

68. In *Durham* v. *Taylor*, 29 Ga. 166, where chancery reformed a marriage settlement to conform to the engagement to marry, the woman having been induced to accept the man by his promise to convey to her separate use the whole of her negroes and the man having obtained the marriage by presenting to her what he fraudulently represented to be the settlement agreed upon though it gave her only a partial title to the negroes, Benning, J., for the court, discussed the subject of marriage as part performance in the case of such a contract, saying:

"And is there any good reason why marriage should not be considered a part performance of a marriage contract so as to take that contract out of the statute? The reason assigned in *Montecute* v. *Maxwell*, 1 P. Wms. 618, is that until marriage the promise is not within the statute at all. True, the words of the statute are 'upon consideration of marriage,' not, of a promise to marry. But if we say that these words mean only cases in which marriage already taken place is the consideration, we exclude all cases of antenuptial marriage contracts; and it seems to me, that we must say they mean this, if we say that until marriage the agreement is not within the statute. But who will say that they mean this? Besides, if an antenuptial agreement is not within the statute before the marriage, how can it be so afterwards? The consideration of an antenuptial agreement is *a promise* to marry. That remains the consideration after the marriage. The marriage is the performance of the promise, not its consideration. By the marriage, then, the ageement does not cease to be an agreement in consideration of a *promise* of marriage, and become an agreement in consideration *of marriage*. How, then, can the marriage draw the agreement within the statute if it was not there before? Certainly, we may admit that if it took part performance (marriage) to draw the case within the statute, it would appear absurd to say that that same part performance should draw it out.

"What say justice and equity? Do they not say that these cases of marriage contract are often the very ones which marriage, as part performance, ought to take out of the statute? In other cases, the injured party, if he has parted with his property in performance of the contract, and that fails, may recover it back; but in these cases, if the wife has parted with her property, and the contract fails, that property is gone; the moment the contract gets out of the way, the marital right of the husband steps in and swallows it all, at a mouthful.

"Nay all of her rights are gone, she has become a married woman, and

liament meant to treat such contracts as other than somewhat complicated mutual promises to marry should incline the American courts, perhaps, to regard marriage as part performance in this third class of "upon consideration of marriage" contracts, while denying it to be part performance in the second class. But most American courts, without realizing the ineptness of the argument of Lord Cranworth as applied to this third class of contracts, affirm as to

---

thus has merged in her husband; and his conduct, in repudiating the contract, is not even a ground for demanding a divorce. Indeed, a divorce, if she could obtain one, could not restore her to all she was, if it could to all she had, before the marriage. Great and irreparable is the mischief, if the contract be held void. I myself, therefore, much doubt whether, in cases of this kind, marriage is not such a part performance as takes them out of the statute."—Benning, J., for the court, in *Durham* v. *Taylor,* 29 Ga. 166, 170-172 (1859).

Although the great weight of authority, including the later Georgia cases—see *Bradley* v. *Saddler,* 54 Ga. 681; *Hammond* v. *Hammond,* 135 Ga. 768—is the other way, it should be noted that in Colorado and Missouri a step has been taken in the direction of treating marriage as part performance of mutual promises to marry which have as one of their terms a promise to convey or devise property. *Moore* v. *Allen,* 26 Colo. 197; *Allen* v. *Moore,* 30 Colo. 307; *Nowack* v. *Berger,* 133 Mo. 24. See *Weld* v. *Weld,* 71 Kans. 622, where marriage was deemed full performance to cancel a note which the engagement contract had stipulated that marriage should cancel. But see *Deshon* v. *Wood,* 148 Mass. 132. In *Barbour* v. *Barbour,* 49 N. J. Eq. 429, not marriage but the giving up of a divorce suit, and the condonation of the offense justifying divorce by returning to live with the husband, was the consideration of the oral contract to deed to the wife the house in which the parties had resided, and the contract was enforced in equity after the wife performed the acts called for. See also *Webster* v. *Webster,* 5 Weekly Rep. 725, 27 L. J. Ch. 115.

The Colorado and Missouri cases go upon the idea that the promisee is defrauded by the promisor's refusal to peform after the irrevocable step of marriage has been taken, even if the promisor when he made the promise actually intended to perform. If he made the promise with no intent to perform, then whether the contract is an oral antenuptial marriage settlement one or an engagement contract with a property stipulation as part of it, most courts will give relief. See *Peek* v. *Peek,* 77 Cal. 106; *Green* v. *Green,* 34 Kans. 740. Cf. *Jenkins* v. *Eldridge,* 3 Story 181; *Petty* v. *Petty,* 4 B. Mon. (Ky.) 215; *Tepper* v. *N. Y. Life Ins. Co.* 151 N. Y. Suppl. 1049. But see *Hackney* v. *Hackney,* 8 Humph. (Tenn.) 402. In *Green* v. *Green,* 34 Kans. 740, 745, Horton, C. J., said that the court acted "upon the well established doctrine that fraud takes any case out of the statute of frauds." In *Glass* v. *Hulbert,* 102 Mass. 24, 39, Wells, J., announced the following *dictum*: "In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irretrievable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute."

It should be noted that the statute of frauds relates to contracts upon consideration of marriage and that some antenuptial contracts made in contemplation of marriage have been held to be supported by consideration other than the marriage and, therefore, not to be within the statute. *Jorden* v. *Money,* 5 H. L. Cas. 185; *Riley* v. *Riley,* 25 Conn. 154; *Rainbolt* v. *East, Admr.,* 56 Ind. 538; *Steen* v. *Kirkpatrick,* 84 Miss. 63; *Nowack* v. *Berger,* 133 Mo. 24; *Larsen* v. *Johnson,* 78 Wis. 300. But see *Fraser* v. *Andrews,* 134 Ia. 621; *Mallory's Adm'rs* v. *Mallory's Admr.,* 92 Ky. 316; *Dienst* v. *Dienst,* 175 Mich. 724.

this third class of contracts, as well as to the second class, his conclusion that marriage is not part performance.

It is, of course, impossible to deal in short space with more than one or two specific statute of frauds problems. Whether a promise to indemnify is or is not a promise to answer for the debt, default, or miscarriage of another, whether a bilateral contract, one side of which may be fully performed within a year though the other side cannot be, is or is not an agreement not to be performed within a year, when a memorandum is sufficiently full or is sufficiently signed or delivered, whether a promise under seal which is really given for a consideration need state the consideration, what is the effect of an oral modification of a contract which is evidenced in writing as required by the statute, and many other problems about the statute, could well engage our attention; but after all, diversity of views and holding, as to these and other questions under the statute of frauds, is to be expected and is not too seriously to be deprecated. In 1677, in the statute of frauds, Parliament started on its troublesome way something far more comprehensive than even its framers could have realized and it is well for the law that both strict and liberal construction writers and judges have had their say about it; for the result of the varying constructions, certain text writers and others to the contrary notwithstanding, would seem to have been a reasonable adjustment of the statute to the needs of modern business.

There are those who will throw up their hands in horror at the suggestion that the courts are engaged in the work of adjusting the statute, so as to interfere as little as may be with honest business and yet subserve the statute's general purpose of diminishing perjury and subornation of perjury; but to the writer, at least, the viewpoint of Sir Peter Benson Maxwell in his work on "The Interpretation of Statutes," seems sound. In respect to the construction of the statute of frauds he said:

> "Enactments, also, which impose forms and solemnities on contracts, on pain of invalidity, are construed so as to be as little restrictive as possible of the natural liberty of contracting. It was in allusion to the statute of frauds that Lord Nottingham said that all acts which restrain the common law, that is, apparently, which impose restrictions unknown to the common law, ought themselves to be restrained in exposition: *Ash* v. *Abdy*, Swant. 664."[69]

But, it may be asked, is not that an approximation to judicial legislation, if not really judicial legislation? Has not strict con-

69. *Maxwell*, "The Interpretation of Statutes" (5 Engl. ed.) 469-470.

struction been applied in such a way as to amount to a judicial taking out from the operation of the statute of many contracts which Parliament meant to include? Perhaps as interesting a question as any in reference to the statute of frauds is this one as to whether there has been an overstepping of the judicial function by the courts by judicial legislation. When, if at all, does the court cease to interpret and either add to the act matters which only the legislature should have added, or subtract from the statute matters which the legislature put there and which only the legislature should take away? A specific case will lend point to our discussion and perhaps will serve to dissipate some of the more prevalent erroneous notions about the extent to which, if at all, the courts really have legislated matters into or out of the statute of frauds.

In *Reeve* v. *Jennings*,[70] the plaintiff Reeve, a dairyman, brought suit for an injunction against the defendant Jennings, a former employee of the plaintiff, to restrain him from committing breaches of his agreement of service by engaging on his own account in the business of a dairyman. The agreement of service was oral, was made on April 11th, 1908, and was to the effect that the defendant should serve plaintiff at an increased salary stated, but otherwise on the same terms and conditions as those contained in a written agreement of service which the parties had made at the time of a former employment. That previous agreement provided for plaintiff's employment of defendant in plaintiff's trade or business of a dairyman at a stated wage per week for a time not stated, but to be "until this agreement is determined as hereunder provided" and with the clause "This agreement may be determined by either party giving the other one week's notice in writing to terminate on a Saturday," and under that previous agreement the defendant agreed that he would serve plaintiff until the determination of the agreement and that within 36 months after quitting or being discharged from said service he would not engage in any way in the business of a dairyman within a radius of four miles as the crow flies from plaintiff's place of business. After serving plaintiff from April 11, 1908 to February 6, 1910, the defendant on the latter date left plaintiff's employ and started in the business of dairyman on his own account within four miles of plaintiff's place of business.

The sole question in the case was whether the statute of frauds was a defense to plaintiff's suit. The provision of the

70. [1910] 2 K. B. 522.

statute invoked was that part of section 4 relating to agreements "not to be performed within the space of one year from the making thereof." The case was started in the county court and the county court judge held that the statute of frauds provision did not apply to the contract in question and gave judgment for the injunction asked. The defendant appealed and the King's Bench Division held in his favor on the ground that while an agreement in its terms to be performed on one side within a year is not within the statute of frauds, the mere fact that the agreement is capable of being performed by one side within the year is not enough to keep the statute from applying. Both Sir Reginald Bray and Lord Coleridge delivered opinions, and Lord Coleridge said:

"The statute of frauds has been much buffeted about by decisions, but its life is not quite extinct, and it is, in my opinion, sufficiently alive to apply to this case."

He ended his opinion by saying:

"I prefer to adhere to the view that the statute means what it says."[71]

In line with that it may be noted that a Harvard Law Review editor referred to the decision as showing—

"A wholesome disinclination to subject the statute to further encroachment by judicial interpretation."[72]

Now, an attitude of protest against the paring down of the statute of frauds is no doubt commendable, but a laudible attitude of protest may lead one to be too suspicious. It would seem that such was the case in *Reeve* v. *Jennings*. Certainly a learned writer in the Law Quarterly Review (January, 1911) had no hesitancy about saying that the decision in *Reeve* v. *Jennings* was erroneous.[73] The case turned on the question of when an agreement is "performed" and, in considering that question, there were two parts of the contract to which attention had to be addressed. Is a promise to refrain for 36 months from engaging in a certain business one which can be "performed" within a year? The question so stated seems foolish, but some American courts have answered that the promisor's death within the year would constitute performance, because, by dying, as he might within the year, he would refrain not

71. Id., pp. 529, 530.

72. Harvard Law Review, XXIV, 161.

73. *A. E. Randall*, the learned Editor of "Leake on Contracts," in an article on "Reeve v. Jennings," Law Quar. Rev., XXVII, 80.

merely for three years, but forever from engaging in the business.[74] Of course the promisor would not die in order to perform, but by dying he would perform willy nilly, since by that one act he would go out of business forever and would conclusively demonstrate that he would stay out, or rather must inevitably remain out, for the shorter time stipulated. A court ought not to quibble over whether such death of the promisor would be performance within the meaning of the word "perform" in the statute, but ought to deem the possibility of death the possibility of performance. But if the promise not to engage in the business for 36 months is all right, since he might both quit (or be discharged) and die within the year, was the contract that defendant would work for an unstated time, that plaintiff would pay him so much per week and that the contract might be determined by either party giving the other one week's notice to terminate on a Saturday, a contract that could be fully performed within a year? It would seem so. The contract was one to work till notice to terminate and for one week more. On notice given after one week of service, either party could have fixed the full limit of the contract's continuance as two weeks, and a two weeks' contract is of course not within the statute. The case is not one of a contract for more than a year's service—say a two years' contract—terminable on notice, for as to that it may be arguable whether it is performable within a year as distinguished from destroyable;[75] but the instant case is, instead, either

74. *Doyle* v. *Dixon*, 97 Mass. 208; *Hill* v. *Jamieson*, 16 Ind. 125; *Foster* v. *McO'Blenis*, 18 Mo. 88; *Erwin* v. *Hayden*, (Tex. Civ. App.) 43 S. W. 610. Compare *Warner* v. *Texas*, etc., R. R. Co., 164 U. S. 418. *Contra*: *Gottschalk* v. *Witter*, 25 Ohio St. 76; *McGirr* v. *Campbell*, 71 N. Y. App. Div. 83.

75. That such a contract is within the statute, see *Dobson* v. *Collis*, 1 H. & N. 81; *Hanau* v. *Ehrlich*, [1912] A. C. 39, (a decision of the House of Lords affirming [1911] 2 K. B. 1056; *Meyer* v. *Roberts*, 46 Ark. 80; *Harris* v. *Porter*, 2 Harr. (Del.) 27; *Wilson* v. *Ray*, 13 Ind. 1; *Biest* v. *VerSteeg Shoe Co.*, 94 Mo. App. 137, 70 S. W. 1081; *Wagniere* v. *Dunnell*, 29 R. I. 580. That such a contract is not within the statute, see *Roberts* v. *Rockbottom Co.*, 7 Metc. (Mass.) 46; *Blake* v. *Voigt*, 134 N. Y. 69. *Cf. Weatherford, etc., Co.*, v. *Wood*, 88 Tex. 191.

As was said in a Kansas case:

"If the contract permits its destruction by the parties, that destruction is merely carrying out the terms of the agreement and nothing more."—Smith, J., in *Johnston* v. *Bowersock*, 62 Kans. 148, 160. Even in *Hanau* v. *Ehrlich*, *supra*, where the question was whether a contract of employment for two years determinable on six months' notice by either party during that period was or was not an agreement not to be performed within a year, Earl Loreburn, L. C., admitted that "If you are to look at the words of this statute without any previous guidance at all, to my mind either construction contended for is possible as a matter of language and pure interpretation of the meaning of language," ([1912] A. C. 39, 41) Lord Atkinson thought "the language of this statute is ambiguous" ([1912] A. C. 39, 42) and Lord Alverstone said that he could "quite see that if there were an absolutely clear slate it might be possible to construe the statute somewhat differently" (id.) but

one of contract, the life of which is fixed rather than cut short by the notice,[76] or else one of not to exceed a year's duration.[77]

But whether *Reeve* v. *Jennings* is a correct or an incorrect decision, it must be apparent that the question in the case was by no means simple, and, even if it be admitted that the statute of frauds has been so buffeted about by decisions that the amount of life in it is somewhat problematical, it is by no means certain that Lord Coleridge, who "preferred to adhere to the view that the statute means what it says," did not in fact misunderstand what the statute says.

But if we assume that Lord Coleridge and his fellow judges succeeded in adding only one more to the many misinterpretations of the statute, were he and his fellow judges guilty of the charge of judicial legislation? It is easy to cry "judicial legislation" when an erroneous decision is encountered, but is a wrong decision as to the meaning and application of a statute necessarily judicial legislation?

The first thing to notice is that the phrase "judicial legislation" is one of double meaning. When used by writers on jurisprudence "judicial legislation" is the phrase used to describe the "unwritten,"

---

all the judges agreed that the interpretation of the language in *Dobson* v. *Collis*, supra, [1 H. & N. 81] in 1856, followed frequently since at nisi prius, should be reaffirmed.

76. Compare *Rayner* v. *Drew*, 72 Cal. 307; *Hodges* v. *Richmond Mfg. Co.*, 9 R. I. 482; *Drew* v. *Billings-Drew Co.*, 132 Mich. 65. A real property analogy should be noted here. An estate to a woman "during widowhood" is an estate upon limitation and her remarriage does not cut it short but marks its end in the same way that death does, but an estate to a widow "for life, but if she marries again said estate to cease" is one upon condition, and if she marries again and the condition is insisted upon in the proper way an estate for her life is cut short. It would seem that in *Reeve* v. *Jennings*, a proper notice given to terminate the contract on a Saturday within the year would be an ascertainment that the normal and natural ending of the contract was within the year, rather than a premature cutting off of a contract having over a year to run, and that, therefore, the contract was demonstrably not in the class of agreements not to be performed within a year. In the case of a contract for two years terminable on six months' notice, however, it might be fair to say that the real property analogy of a condition subsequent is applicable, though the opposite conclusion appeals to the writer.

77. "In the first place it is to be observed that no time was fixed during which the employment was to continue, and it was presumptively an engagement for twelve months, and one to which the statute had no application; *Fawcett* v. *Cash* (1834) 5 B. & Ad. 904, 39 R. R. 709. I say presumptively for twelve months, but there is some authority for saying that it was only a weekly hiring: *Baxter* v. *Nurse* (1844) 6 Man. & G. 934, 64 R. R. 891. And a continuation in service after a fixed period has been treated as a renewal for a fresh term not exceeding twelve months, and held not to be within the statute: *Beeston* v. *Collyer* (1827) 4 Bing. 309, 29 R. R. 576": *A. E. Randall*, "Reeve v. Jennings," Law Quar. Rev., XXVII, 80.

i. e., non-statutory, or judge-declared and so judge-made law.[78] On that view, the common law judge, exercising his traditional power of adapting old rules to new conditions and of evolving new rules by reasoning from established old ones is, of necessity, a judicial legislator. But that meaning of judicial legislation is not the normal one in this country today, for to our lawyers and judges, if not to our legal scholars, judicial legislation is a term of reproach. When we say that a judge is a judicial legislator, we usually mean that he is usurping powers which rightfully belong to the legislature. Not judge-made law as a whole, but only law that is judge-made when it should have been legislature-made, or left unmade, is what today we are accustomed to denominate judicial legislation. The judicial legislation that we object to is judicial usurpation of legislative powers, and that may take place either by the refusal of the court to recognize as constitutional statutes which really are constitutional or by the failure of the court to give a statute passed by the legislature and recognized as constitutional the extent which its language, fairly interpreted, discloses that the legislature intended it to have. Is judicial legislation, in this opprobrious sense of the phrase, chargeable to the courts with reference to the statute of frauds?

But while we have today arrived at the idea that judicial legislation means judicial usurpation, we seem by no means to have settled all questions about the phrase. If a judge, who acts in the best of good faith and who decides only after a most painstaking review of the authorities, fails to apply a statute to a situation to

78. "In its proper sense, the term judicial legislation or judicial law-making is used by jurists to refer to decisions by judges of cases of a novel character, not governed or imperfectly governed by existing rules of law, whereby new rules of law arise. In part it is required by the impossibility of foreseeing the infinite variety of causes upon which courts must pass and of establishing principles for their determination in advance. In large part, however, it is a survival from times when there was little or no legislation, and when legislative and judicial functions were confused and undifferentiated. Consequently, its scope and importance in our legal system are diminishing continually. Like judicial discretion, this power is not arbitrary and unrestricted but must be exercised along well-settled lines. The chief agent in judicial law-making is analogy and the process today consists in choosing between competing analogies of existing rules and selecting and developing that which appears most in harmony with the rest of the legal system and most consonant with reason and justice."—Professor *Roscoe Pound*, "Introduction to the Study of Law," § 4, pp. 12-13.

"By judicial legislation we mean that power which courts claim and have exercised in all free governments of formulating from a few maxims or general principles a vast flexible, complex, yet elaborate system of laws capable of embracing all the varied wants of human life; whilst they are in their terms as precise and certain and authoritative as those emanating from the legislature."—Alb. Law Journal, I, 105 (1870). See also article by *Albert J. Chapman*, Western Jurist, VI, 201 (1872).

which it fairly applies, or applies it to one which it does not fairly apply, is he a judicial legislator? Or to be a judicial legislator must he intentionally and deliberately misinterpret it? There is no doubt that, as a matter of intellectual analysis, judicial usurpation may take place without any intent to usurp, but, after all, has the phrase "judicial legislation" yet come to mean this unintentional usurpation which reflection discloses it logically can mean? Have we not confined, and should we not continue to confine, the phrase judicial legislation as a term of opprobrium to the case where the judge deliberately does that which he knows only the legislature may properly do, or deliberately refuses to recognize as done that which he knows the legislature did and had a right to do? It would seem that judicial legislation, in so far as it is now a term of reproach, should be confined in meaning to intentional usurpation of legislative powers by the judiciary, and hence that if Lord Coleridge and his associates misapplied the statute of frauds in *Reeve* v. *Jennings,* when undoubtedly they had the best of intent to apply it fairly, they were not judicial legislators, but were simply mistaken judges. The theory that the executive, the legislative and the judicial departments of the government are distinct is only approximately workable. A judge who fails in an honest effort to ascertain the intention of the law-making power, as expressed in a statute which he is construing, is none the less, even in his moment of failure, a genuine judge; his failure cannot fairly be said to convert him pro tanto into a legislator.

Judicial legislation, in the sense of usurpation of legislative powers, is properly a term of reproach. In 1892, the editor of the American Law Review spoke of those "judges who labor under the hallucination that their vocations are quasi-legislative."[79] Judges may occasionally and accidentally legislate, in the legislative sense of legislate, without doing much harm; but those who start out to legislate in that sense are like the proverbial bull in the china shop—the wreckage they cause is certain to exceed their value to society. The judicial function calls for a sane application of principles drawn from precedents, or ascertained by reasoning from those precedents in the way sanctioned by good judicial usage. There is a judicial discretion to be exercised in the application of old rules to new conditions and in the ascertainment and application of new rules where old ones are inapplicable, but that discretion is not properly unfettered and whimsical, and can on no account be allowed to become such. It is sound judicial discretion that

79. Am. Law Rev., XXVI, 105.

is wanted and the reformer who is not content with that should be referred to the legislature. So, if a statute has been passed and its meaning and its application are clear, it is not for the judge, through the guise of interpretation, to change the statute.

So far as a judge is consciously legislating in excess of what he knows to be the traditional legislative right of the judiciary, he is violating his oath of office. Such action on his part is a breach of that supreme law of the land which has separated the executive and legislative functions from the judicial. So far as a judge is a politician or a statesman rendering decisions, he is not a judge. The judge must be able to understand legislative policies and to see the social value, or at least possible social value, of the legislation passed, but the judge, as judge, can not be a political or other partisan and yet perform his judicial function properly. A genuine judge must be a sincere and earnest searcher for the intent of the constitution makers and legislation enacters of his government; for, as a writer has said recently: " 'The intent of the law-maker is the law': *Jones* v. *Guaranty Co.*, 101 U. S. 626. This is possibly rather broad in its terms, but no exception can be taken to the proposition that the intent of the law-maker, aptly expressed and within constitutional limitations, is the law."[80]

While judicial usurpation is to be condemned, judicial law-making has a wider scope than often is realized. The judicial function is exercised as much where there is a common sense determination not to send parties to the legislature for help as where there is a common sense determination to do so. In doing the work traditionally done by courts, or rationally a legitimate expansion or extension of that work, the courts are not usurping anything, but instead are performing without shirking, the high duties which are theirs. The notion that litigants must be sent trotting to the legislature with every little thing is to be condemned more, if that be possible, than the opposite notion that they should be kept from going there for legislation whenever possible. The fact of the matter is that in the twilight zone of the judicial and the legislative functions—in that place of contact and of overlap which cannot be said to belong exclusively to either function—the judges may reasonably have the first say, for, of course, the constitution permitting, the legislature will have the last.

Where legislation has been enacted and the courts are asked to elucidate that in it which is obscure and to apply the statute to conditions which the legislators never dreamed of, the courts may

80. Va. Law Reg., XV, 577, 586. See note 29, ante.

fairly restrict the application of the statute in every reasonable way. This is particularly true in the case of the statute of frauds, and the confusion in decisions has come from the failure of many judges to recognize that fact.

"It is no offense to the judiciary to say that there is a clearly recognized line of demarkation extending through the list of adjudicated cases. Upon one side are those who favor the enforcement of the statute, however injuriously it may affect one or the other of the litigants in a given case. On the other side are judges of a type who, although infused with the spirit of the statute and its purpose, refuse to follow it literally if reasonable means are apparent, sanctioned by the law, for rendering a just and righteous judgment between the parties. The above condition of things has been prolific in inextricable confusion in the adjudicated cases. There is no other statute that has been the source of so much litigation. The decisions in the same state, as will be seen, lack uniformity and are often contradictory. The law on the statute of frauds is in many states chaotic and unsettled."[81]

But, while the lack of uniformity in construction of the statute of frauds is to be regretted, it must be remembered that there is great lack of uniformity in decision as to many common law matters and that the statute of frauds has become practically part of the common law. It is not a newly created statute, but an inherited one, like the statute of Quia Emptores, the Statute of Uses, or any other statute which came to us with the common law system. It is a statute which the state legislatures may fairly be deemed to have remitted to the courts as a legislatively-created part of the common law. An American court, in addition to asking what the lawmakers of 1677 meant by the statute, must also ask what the statute had come to mean, through judicial construction by the English courts, at the time when we inherited it; for "whether conclusive or not, the English decisions are certainly pertinent authority in America. But it has been held that English rulings need not be followed unless they convince."[82]

The English holdings have frequently been contradictory and often have not been convincing, with the result that our American courts have differed in their interpretation of the statute. But when all is said and done, the statute of frauds remains a seventeenth century statute, despite the fact that the various sections were readopted in various territories and states in this country in the eighteenth and nineteenth centuries and that in the Uniform Sales of Goods Act we find the 17th section, as interpreted in Massa-

81. *Smith*, "The Law of Fraud," sec. 311.
82. *Reed*, "The Statute of Frauds," I, sec. 3, pp. 6-7.

chusetts, being readopted in some jurisdictions and urged for adoption in others, even in the twentieth century. It is, no doubt, true, however, that although the intention of the American legislatures in reenacting the statute of frauds has been largely the same as that of Parliament in 1677, there was not at the time of the re-enactment the same need to curb juries that there was in 1677. While there was and still is considerable impatience with juries, the occasion for impatience with juries is less, of course, today than was the case in 1677, and the law of proof is very different today from what it was then. Since the need of the statute is less today, the court, in a doubtful case, may well restrict the operation of the statute wherever reasonably possible. It is unquestionably a seventeenth century statute enacted to meet conditions which in part have passed away; but while in doubtful cases that fact should weigh, it does not furnish sufficient reason for departing from established construction. Some courts have given that fact more weight than have others, with consequent variety in interpretation.

But it is not variety of interpretations alone that causes complaint of the action of the courts in construing the statute of frauds. There is a failure to appreciate the full scope of interpretation. The charge that the courts are revising the statute, and even partially repealing it, under the pretense of interpreting it, is no new one, but it is made largely because those who make it do not understand the various legitimate ways of ascertaining legislative intent. Those ways are for the court: (1) To recreate the conditions which confronted the legislature and to ascertain the precise sense in which the enacters of the statute understood its terms; (2) If such direct information is not obtainable, or leaves the court in doubt, to work out the meaning on the assumption that the legislators must have meant what seems to the court the most satisfactory meaning of the words;[83] (3) To apply the statute to condi-

83. "Interpretation is the determination of the meaning of a rule and its application to a concrete case. The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule or the sense which he attached to the words in which the rule is expressed. * * * But the ordinary means of interpretation, namely, the literal meaning of the words used and the context often fail to lead to a satisfactory result. In that case, after vainly trying these primary indices to the meaning and intent of the law-maker, we must have recourse to the reason and spirit of the rule or to the intrinsic merit of the several possible interpretations. * * * Strictly both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the law-maker meant, by assuming his position in the surroundings in

tions unknown to the legislators if the court is satisfied that the legislators meant it to apply to unknown conditions of the same general character as those known to the legislator, i. e., if the statute is intentionally comprehensive of certain general types of conditions and the new conditions are fairly to be considered to be embraced in one of those types.[84]

It is because so little has been known about the precise sense in which the enactors of the statute of frauds used certain important words and phrases and because in resorting to the second and third ways of ascertaining the legislative intent the courts have been unable to agree upon what is the most satisfactory meaning of

---

which he acted and endeavoring to gather, from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the law-maker indirectly. It assumes that the law-maker thought as we do on general questions of morals and policy and fair dealing. Hence it assumes that of several possible interpretations the one which appeals most to our sense of right and justice is most likely to give the meaning of those who framed the rule. If resorted to in the first instance, or without regard to the other means of interpretation this could not be regarded as a means of genuine interpretation. But inherent difficulties of expression and want of care in drafting require continual resort to this means of interpretation for the legitimate purpose of ascertaining what the law-maker in fact meant."—Professor *Roscoe Pound*, "Introduction to the Study of Law," pp. 13-14.

84. An excellent illustration may be borrowed from constitutional law, for in the Constitution's clauses, even more than in statutes, an intent inclusive of unknown and unknowable conditions thereafter to arise is often found. In *Brown* v. *Maryland*, 12 Wheat. 419, Chief Justice Marshall laid down the doctrine that, because of the prohibition by the federal Constitution of the levy by a state of imposts and import and export duties and because of the power given to Congress to regulate both interstate and foreign commerce, a license fee could not be exacted by a state from importers so long as the latter sold the imported things only in their original packages. In *May* v. *New Orleans*, 178 U. S. 496, the United States Supreme Court held as to imported goods that by original package was meant the box or case in which the articles imported were shipped and not the separate parcels or smaller boxes contained in that box (see also *Purity Extract Co.* v. *Lynch*, 226 U. S. 192), and then in *Austin* v. *Tennessee*, 179 U. S. 343, followed that up by deciding that single packages of cigarettes shipped into a state which forbade the sale of cigarettes were too small to constitute "original packages." *Austin* v. *Tennessee* determines that an "original package" must be in size and kind such a package as ordinarily is made up to ship to a wholesale dealer, and that a package made up just to evade the laws of the state of import will not serve. See *Cook* v. *Marshall County*, 196 U. S. 261. A prettier instance of legitimate judicial law making in the process of constitutional construction could hardly be found. It is an application of the constitution to conditions of which the constitution makers probably did not dream, but an application which is made as doubtless they would have wanted to have it made. It is an application made because of the comprehensive intent of the constitution, though evidence of any specific intent of the constitution in reference to this particular "original package" problem is of necessity lacking. The fact that such specific intent did not exist because the problem was not thought of, if it be a fact, in no way prevents the solution of the problem from being one in interpretation even though it verges on legislation.

those words and phrases that so much room has existed for recrimination. It is demonstrable, however, that while the courts have failed to agree in interpretation, they have actually been engaged in that legitimate judicial work and have seldom been usurping legislative powers.

Perhaps enough problems have already been touched upon to make it possible to find in the judicial handling of the statute of frauds certain suggestions for the courts in reference to the interpretation of the federal constitution. The lesson to be learned from the statute of frauds' cases is mainly one of the need of a large view of the thing to be interpreted. It would seem that the statute of frauds has been on the whole, and in essentials, sympathetically and sensibly interpreted, for what appears at first sight to have been judicial legislation turns out, in most cases, after a full examination of the source material, to be merely a natural difference of opinion as to the legislatively intended application, or lack of application, of the statute, or as to a legislatively intended exception to the statute, or else to be merely such a difference of opinion as to the application of the statute to conditions not specifically contemplated by the legislature, but fairly to be deemed to be within the general scope of the enactment.[85] It is only by a thorough-going study of the causes which led to the enactment of the statute of frauds, by a consideration of the intent of its framers and by a broad-minded recognition of the changed conditions which confront us today, that one can hope to qualify as a sound critic of the decisions under the statute of frauds. So, for the interpretation of the federal Constitution, the conditions which led to its adoption, the intent of the members of the constitutional convention that drafted it and of the states that adopted it and the very different industrial situation, social needs and political problems of that day from those of ours must all be weighed with a view to

85. "Except in some cases where a statute has fallen under the principle of excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."—*Maxwell*, "The Interpretation of Statutes," 5th Engl. ed., 128. See *State* v. *Cleaveland*, 83 Ohio St. 61.

"Moreover, it happens frequently that the law-maker did not foresee or consider a question that subsequently becomes important. In such case there is no rule at hand and the court must make one by developing the materials which the law affords it. This process of meeting deficiencies or excesses in rules imperfectly conceived or enacted is called spurious interpretation. It is a form of judicial law-making required by the same conditions and justified by the same necessities as the judicial law-making already considered [See note 78 ante]."—Professor *Roscoe Pound*, "Introduction to the Study of Law," 14.

a broad-minded and sympathetic interpretation and application of the Constitution.

There is much discussion today of the right of the courts to declare acts of the legislature unconstitutional. Was that right intended to be conferred on them or are the courts usurpers in exercising it? It is not merely a matter of words, though the language of the federal Constitution, at least, seems to call for that right, but is a question of the intent of the constitution makers and adopters as ascertained through historical research. The evidence in favor of the view that the right was intended to be exercised by the courts is much stronger than the evidence in favor of the view that Parliament intended the equity judges to disregard section 4 of the statute of frauds in cases of part performance. But both views are to be judged in a broad-minded way, and the actual practice is not to be deemed usurpation in fact, let alone in intent, in the absence of overwhelming evidence that it is unauthorized and such overwhelming evidence does not seem to be forthcoming. The practical interpretation of a statute or of a constitution, when acquiesced in for years, furnishes of itself some evidence of its intended meaning in case of doubt, just as the practical interpretation of a contract by the parties to it often determines the interpretation finally put on it by the court; and we may safely conclude that the exercise by the courts of the power to declare laws unconstitutional, so long unchallenged and even today only in part objected to, is a justified practical interpretation of the constitution.

But conceding the rightfulness of the exercise by the courts of the general power to declare laws unconstitutional, that power must not be exercised in any narrow-minded way, if the courts wish to retain it or if it is desirable that they should. A constitution is a people-created charter for the state or nation, and as such charter is to be construed, not for the people of 1776 or other year who framed it, but are dead and gone, but for the people of today. That does not mean that established constructions are lightly to be thrust aside for new ones; that precedent is to give way to judicial whim; or that constitutional law is to be the latest judicial guesses as to what the people want. But it does mean at least that constructions that have been placed on the constitution are not to continue unless they can justify themselves when reviewed in the light of our constantly increasing historical perspective, practical experience and educated intelligence.

The statute of frauds' contract provisions have lasted prac-

tically unchanged in phraseology simply because the courts have done their best to construe the statute in such a way as to interfere as little as may be with legitimate and unquestionably proved transactions, and our federal Constitution will remain in substance the same so long as the courts construe it in such a way as not to prevent or cripple legitimate popularly wanted legislation. In construing the statute of frauds, the judges have, in the main, acted as became the judicial representatives of the people, interpreting and enforcing the statute in the interest of the people whose servants the judges are, but in construing our state constitutions, at least, the courts have occasionally been inclined to regard themselves, not as the judicial popular representatives of the people—not as the people's tribunal—but as the inspired judicial despots of the people. Even if it be conceded that, in exercising its power to declare laws unconstitutional, the judiciary is protecting Philip sober from Philip drunk, it remains true that Philip should not be pronounced drunk unless he clearly is so. If Philip is too often pronounced drunk when he is really sober, he will recall from office the pronouncer or nullify his pronouncement, or both, or, perhaps, even worse, will take away the constitutional protection which Philip sober has arranged for Philip drunk.

And now for one last observation. We are apt to overestimate the value of statutes and of constitutions. Were it not for the reckless, or at least thoughtlessly unfair, things which might be done in the first burst of freedom following the removal of all constitutional checks, we could do away with our written constitutions with safety; for we are at heart, as a people, fully as conservative as are our British brethren and fully as capable as they are of getting along with only an unwritten constitution. That doesn't mean that we are likely to do so, for we are suspicious of ourselves and unless the progressives of one kind or another convince us of our own essential trustworthiness as a people we are not likely to go without the written constitutional guarantees that we have talked about so much. So the statute of frauds' contract and trust provisions which succeeding generations have alternately or simultaneously praised and condemned, might well be dispensed with were it not for the period in between their disappearance from the statute books and that adjustment of business customs, accompanied by increased vigilance of judges and jurors in the detection of perjury, or by the adoption of new rules of evidence to prevent

perjury, which after a while would make the statutory provisions unnecessary.[86]

But however willing or unwilling we may be to dispense with the statute of frauds or with written constitutions, it must always be remembered: that statute making, statute amending, and statute unmaking, if the statute is constitutional, is a legislative function; that constitution making, constitution amending, and constitution unmaking, is a people's prerogative; and that statutory and constitutional interpretation and enforcement by the courts, with all that such interpretation and such enforcement fairly imply, including to the present time in the United States the right to declare statutes unconstitutional, are an exercise of the judicial function with regard to statutes and constitutions. The exercise of that judicial function, both with reference to the statute of frauds and with reference to the American constitutions, means much to many hundreds of thousands of people, and it is to be hoped that it will continue to be exercised sanely. As far as the statute of frauds is concerned, we may answer the question in the title of this paper by saying that the exercise of the judicial function in the interpretation and application of the contract clauses of the statute, however disappointing it may have been because of the variety of interpretations given, has been in the main free from judicial legislation in any blameworthy sense of those words.

86. "In Scotland all facts may be proved by oral testimony, except those which the law requires to be proved by written evidence, or by writ or oath of the party. So generally a promise to pay money, unless it be to pay less than £100 Scots (which is equivalent to £8. 6s. 8d. English), or an obligation regarding lands, except leases for years, submissions regarding movables, gifts, discharges, renunciations of right, or prescribed contracts, must be proved by written evidence. But notice that this is a law of evidence. In England a somewhat similar result has been attained by the famous Statute of Frauds, but this is not a rule of evidence, but of the essentials of the contract. . . .

"Hence, if a contract which ought to be in writing is not, you cannot sue upon it in England. . . . In Scotland it is not directly provable, but by a quaint ceremony peculiar to Scotland you can put the other party on his oath and the contract is enforceable."—*J. W. Brodie-Innes*, "Some Outstanding Differences Between English and Scots Law": "V, The Law of Contracts," Juridical Review, XXVIII, 62, 67-68.

LIABILITY OF PERSONAL REPRESENTATIVES ON LEASES

By John R. Rood[1]

I

Liability as Representatives

The personal representatives of a deceased person are liable to the extent of his assets on all express covenants in leases executed by the deceased, though representatives be not mentioned in the lease; and this liability is not avoided by the assignment of the lease by the deceased or by the representatives before the breach sued on occurred.

Anon., (1537) Dyer 14a, pl. 69: a lessor sued the executors of a lessee for breach of the lessee's covenant to build a new house within three years, which was held to lie though executors were not mentioned.

Anon., (1583) 3 Dyer 324a, pl. 34: a lessor sued executors of the lessee on his covenant to keep in repair, broken after his death by negligent burning by the executors, and obtained judgment de bonis testatoris.

Brett v. *Cumberland,* (1617) Cro. Jac. 521, was covenant by the grantee of the reversion against the executor of the lessee for rent accruing after the defendant's testator had assigned and plaintiff had accepted rent of the assignee of the term; and it was held maintainable by the express terms of the statute 32 Hen. VIII, c. 34, that "such remedy as the lessor might have had against the lessee or his executors, such remedy the assignee shall have against them; it being a covenant in deed which runs with the land. But, otherwise it is of a covenant in land which is only created by the law; or of a rent which is created by reason of the contract and is by reason of the profits of the land, wherein none is longer chargeable with them than the privity of the estate continues with them."

Collins v. *Thoroughgood,* (1600-1620?) Hob. 188, awarded judgment de bonis testatoris against an executor for breach in his own time of a covenant of testator as tenant to keep in repair.

Bachelour v. *Gage,* (1631) Cro. Car. 188, was covenant by the lessor against the executor of the lessee for breach after the assignment of the term by the lessee and acceptance of rent by the lessor

1. [Born at Lapeer, Mich., July 9, 1868; LL. B., University of Michigan, 1891; in practice at Marquette (Mich.), 1891-98; Professor of Law, University of Michigan, 1898-1918; now in general practice at Detroit, Mich.; author of treatises on garnishment, and wills; compiled digest of leading cases on criminal law, on attachment, garnishment, judgments and executions, and on real property; and author of numerous articles published in law reviews.—Ed.]

from the assignee, and after death of the lessee, of the covenant in the lease not to build to the prejudice of the plaintiff's light; and it was held neither the assignment, acceptance of the rent, nor the death of the tenant, prejudiced the right of the plaintiff to recover for breach of the covenant.

Coghill v. *Freelove,* (1691) 3 Mod. 325, 2 Vent. 209, sustained debt for rent against the administrator of the lessee for rent accruing after the administrator had assigned the term, and said that even assignment by the intestate would not have terminated the liability by privity of contract.

Enys v. *Donnithorne,* (1761) 2 Burr. 1190, was covenant by the executor of the lessor (possessed of a term for 99 years) against the executor of one of the lessees for 50 years, for rent accruing after the death of both testators; and it was held that the joint and several covenant of defendant's testator to pay the rent bound the defendant executor, although by the death of his testator before the term commenced the whole term and benefit survived to the other tenant.

Hellier v. *Casebert,* (1663) 1 Lev. 127, 1 Sid. 240, 266, was debt against an administrator of a lessee for rent, who pleaded that before the rent accrued he had assigned the term, which upon demurrer was held bad, because he is bound to perform all contracts of the deceased so far as he have assets, whether the term was worth the rent or not, and if he continue in possession he is liable by receipt of the profits have he assets or no.

Wilson v. *Wigg,* (1808) 10 East 313, sustained an action against an executor for breach by his assignee of covenants in a lease made to his testator.

Curtis v. *Hunt,* (1824) 1 Car. & P. (12 E. C. L.) 180, awarded judgment against executors of the tenant for breach of his covenant to repair 28 years after testator died, they having long before fully administered, and the only proof of assets being the affidavit filed in the case to avoid stamp tax that the assets did not exceed £5,000. Abbott, C. J.: "The executors might have taken an indemnity from the legatee, . . . (or) kept the premises to answer the expense of repairs. It is unfortunate for the executors, but the lessor must not suffer because they neglected to do what they might have done."

Phillips v. *Everard,* (1831) 5 Simons 102, was a bill by the landlord against the executors of the tenant for specific performance of testator's agreement to accept a renewal of the lease for ten years and execute a counterpart; to which the executors objected that the renewed lease like the original would contain a covenant not to assign, that executors must assign, that the executors would be personally liable on any engagement they should make, that the duty of their office required them merely to fulfil their testator's engagements, not to enter into new ones, and that the plaintiff should be left to his remedy in damages, since decreeing specific performance is discretionary with the court; but specific performance was decreed, with direction to protect the executors against personal liability. Followed under protest in *Stephens* v. *Hotham,* (1855) I Kay & J. 571.

Davis v. *Blackwell,* (1832) 9 Bing. (23 E. C. L.) 5, was covenant

against an executor for breach in his time of covenant in lease to testator to keep in repair, and payment of legacies within nine months of the death of the testator was held no defense.

Tremeere v. *Morrison,* (1834) 1 Bing. N. Cas. (*27* E. C. L.) 89, 4 M. & Sc. (30 E. C. L.) 603, holds it no defense to an action against an administrator for failure to repair under lease of intestate, that the premises yielded no profit to make repairs with. Followed in *Sleap* v. *Newman,* (1862) 12 C. B. (N. S.) (104 E. C. L.) 116, as to executor.

Burns v. *Bryan,* (1887) 12 App. Cas. 184, H. L. (Sc.) holds representatives of "M" liable for rent accrued after his death under a lease to him and "L," though by the terms of the lease the whole interest passed to the survivor, was forfeitable on bankruptcy, and "L" became bankrupt soon after the lease was taken, there being no forfeiture ever claimed, and the lease expressly binding the parties and their representatives.

Scott v. *Lunt,* (1833) 7 Peters (32 U. S.) 596, was an action of covenant by the assignee of a fee-farm rent against the administrator of the grantee in fee for rent accruing after the grantee had parted with his title, which fact the court held no defense, but the case went off on another point.

Greenleaf v. *Allen,* (1879) 127 Mass. 248, sustained an action against an executor for rent accruing under lease to testator both before and since decease, though testator had assigned the term.

Alsup v. *Banks,* (1891) 68 Miss. 664, 9 So. 895, 13 L. R. A. 598, 24 Am. St. 294, sustained an action against an administrator who had abandoned premises rented by deceased, for the deficiency between the rent deceased promised to pay and what plaintiff was able to obtain by lease in behalf of the estate to lessen the damages.

Taylor v. *Cabanne,* (1879) 8 Mo. App. 131, sustained assumpsit against an executrix for rent accruing after testator's death, against objection that the term was not worth the rent, for the executor cannot waive the term to avoid liability as long as he has assets.

Van Rensselaer v. *Platner,* (1800) 2 Johns. Cas. (N. Y.) 17, was covenant by executors of a grantor reserving rent in fee, against the executors of the grantee in fee, for rent accruing in the life of both parties and since the death of both; and it was held that while debt was not maintainable against executors in such case apart from statute (32 Hen. VIII, c. 37) for lack of privity of estate, covenant was maintainable against them at common law, even for rent accruing since the death of their testator, but for rent accruing after the death of plaintiff's testator the action was not maintainable, such rent belonging to the heir or devisee.

Pate v. *Oliver,* (1890) 104 N. C. 458, 10 S. E. 709, sustained counterclaim against administrator for rent accruing after sale of the term by him to the lessor.

Williams' Appeal, (1864) 47 Pa. 283, was an appeal from an order of distribution by the orphan's court, directing the executors to distribute the funds in their hands without paying rent accruing since the death of testator under a deed by which land was conveyed to him

in fee, and he for himself, his heirs, and representatives, agreed to pay the rent; and it was held following *Quain's Appeal,* (1854) 22 Pa. 510, that the personal estate was not liable for such rent, since the time must come when the land will be the only property left to pay it, and death of the testator is a good place to draw the line.

Wilcox v. *Alexander,* (1895) Tex. Civ. App. (not officially reported) 32 S. W. 561, was an action against an administrator for rent accrued under a lease after the death of the intestate, and judgment for defendant on the ground that the death of the tenant terminated the liability under the lease was reversed. The administrator is liable though not named in the lease.

Hutchings v. *Coml. Bank,* (1895) 91 Va. 68, 20 S. E. 950, holds married woman's estate liable for rent for whole term of lease made to her, though she died soon after it was made.

Executors and administrators are entitled to and should require indemnity from legatees and distributees against possible future liability under unbroken covenants before distributing the property in their hands.

Simmons v. *Bolland,* (1817) 3 Meriv. 347, was a suit by one to whom leases to testator and other property was bequeathed and to whom the leased land had been delivered, to compel the executors to turn over the remainder; and held that liability on future possible breaches of the covenants in the leases justified the executors retaining the remaining property till indemnified by the legatee.

Vernon v. *Egmont,* (1827-H. L.) 1 Bligh (N. S.) 554, refused order to executor to pay residue to legatee till he should either obtain confirmation of lease made by testator exceeding his estate and powers or give indemnity to executor against future possible suits under the lease.

Cochrane v. *Robinson,* (1840) 11 Simons 378, awarded indemnity to the executors against rent to accrue under leases to testator sold by decree of the court under trusts of the will, though the executor was never in possession.

Fletcher v. *Stevenson,* (1844) 3 Hare 360, denied bill for payment of legacy without indemnity to the executor against possible liability under covenants in a lease to deceased and others as partners, though the surviving partners had taken over the lease, eleven years were yet to run, and there had been no breach by them of the covenants for rent or repairs.

Waller v. *Barrett,* (1857) 24 Beav. 413, was an administration suit, in which a question was raised as to whether the executors were entitled to indemnity against liability under the covenants in leases to the testator which the executors had sold at a premium with a covenant on the part of the purchaser to perform all the covenants in the leases; and because it was an administration suit the decree of the court ordering him to pay would protect the executors, and from selling at a premium it was probable any breach would be redressed by the

lessor claiming a forfeiture rather than suit on the covenants, the court ordered distribution without further indemnity.

Covenants implied by law bind only by privity of estate and representatives are not liable for breach of them.

Swan v. *Stransham,* (1566) 3 Dyer 256a, Moore 74, was covenant against the executor of a tenant for life who had given a lease for 15 years containing no express covenant for quiet enjoyment and had died during the term, for breach of the implied covenant by ouster of plaintiff by the remainderman, and held that being a covenant in law only it ended with the estate and the defendant was not liable.

Adams v. *Gibeny,* (1830) 6 Bing. (19 E. C. L.) 656, was a suit by a lessee for 15 years, ousted during the term, against the executors of the lessor on the covenant implied in law from the word *demise* in the lease whereby the lessee might have recovered against the lessor for loss of quiet enjoyment; but it was held, after argument on numerous cases, the executors are not liable on covenants implied by law.

McClowry v. *Groghan,* (1856) 1 Grant Cas. (Pa.) 307, 310, holds the covenant against eviction implied by law from a lease for years made by a tenant for life, dying during the term, ends with the term.

But a tenancy from year to year, though implied by law from a tenancy at will or a holding over under a definite term is a continuance of the estate which will make the assets of the deceased liable, or the executor personally liable as assignee, under the covenants in the lease for a breach after the death of the lessee.

Pugsley v. *Aikin,* (1854) 11 N. Y. 494, was an action against the executors of a tenant from year to year of a farm at a rent of $400, for the rent accruing the year the testator died and for ten years after, during which time the executors had occupied without paying any rent; to which defendants demurred that there was a mis-joinder of causes, in that the deceased's estate was liable only for the year he lived and not for the occupation by the executors; but the court held that a tenancy from year to year is not terminated by the death of the tenant as the old tenancy at will was, and that the plaintiff was entitled to judgment de bonis testatoris for the whole period, and until the term is ended by notice to quit, given according to law.

II

Liability of Representatives as Assignees on Leases

Acceptance of the office of executor or administrator completes an assignment by operation of law of all assets of the deceased to the representative, giving the lessor an election to hold the representative personally liable as assignee of the term on all cove-

nants in leases to the deceased, subject to the qualification (based on the inability of the representative to accept the office and waive the term) that if the estate have no other sufficient assets the representative is personally liable only for what he might have realized from the term.

Body v. *Hargrave,* (1600) 2 Cro. El. 711, 5 Coke 31b, Moore 566, 12 E. R. C. 47, was debt in B. R. against an administratrix on a lease to intestate for rent accruing since the death, and after verdict for plaintiff of not guilty, and motion in arrest of judgment, it was entered for plaintiff against the defendant's own goods, for it is her own debt and she had the use and same is assets only for the value above the rent, but this judgment was reversed in the exchequer for error.

Howse v. *Webster,* (1608) Yel. 103, it was agreed in B. R. by Yelverton, Williams & Croke, JJ., that the lessor may have debt against the executor of the lessee for rent accrued after the lessee died, though the executor never entered nor agreed, for the executor represents the person of the testator and is concluded by his contract though the rent be more than the value of the use, and he cannot waive the term, and the opinion of Ascue 21 H. 6, 24, & 11 H. 4, contra, was denied to be law.

Rich v. *Frank,* (1610) Cro. Jac. 238, in B. R. sustained debt against an administrator personally for rent accruing on a lease to intestate since his death.

Caly v. *Joslin,* (1648) Aleyn 34, in B. R., after reviewing previous cases, sustained personal judgment against an executrix and husband in debt on a lease to testator for rent since death, "for in as much as the executors cannot waive the term, it were hard if the rent should exceed the value of the land, and they having no assets, that they should be charged in the debit of their own proper goods, and yet if the action must be brought in the detinet only, where fully administered were a good plea, they may then retain the land, and with the profits thereof satisfy debts upon specialty, whereby the lessor should be defeated of his rent; for the avoiding of which inconveniences, it was resolved, that they may be charged in the debit and detinet, for prima facie the land shall be intended to be of greater value than the rent, and if it be otherwise . . ."

Kale v. *Jocelyne,* (1671) Style 61, was debt against an executor on a lease to testator for rent accrued since his decease, and on plea of fully administered, Bacon, J., said the plea was good and so adjudged, to which, Roll, J., answered it had been adjudged both ways, that he was bound by the covenant, could not waive the term, and the land should be presumed worth the rent till the contrary shown, and though Bacon said the defendant might waive the term he was ordered to show cause.

Sackill v. *Evans,* (1674) 1 Freem. K. B. 171, was debt in C. B. against an administrator on a lease to intestate for rent incurred since death, and demurrer to plea of fully administered was sustained, "for although an administrator or executor after the death of the testator

may waive the occupation of the term, and then they shall be chargeable no further than they have assets, yet if they do possess the term they shall be chargeable for the rent de bonis propriis if it occurs in their own time."

Bolton v. *Cannon,* (1675) 1 Vent. 271, Pollexf. 125, 3 Keb. 189, 446, was debt against an executor for rent accrued in his time, plea that the land was not worth the rent, that he had fully administered, and that he had offered to surrender, which had been refused; and held that defendant is liable only for the value of the use, having fully administered, but for having waived his plea as to value, and relied on the offered surrender which is immaterial and frivolous, judgment was given against the defendant for his proper goods.

Billinghurst v. *Speerman,* (1696) 1 Salk. 296. Holt and Hale held an executor sued as assignee of a term under lease to the testator may plead specially that the premises are of less value than the rent and he has no assets; in which case the judgment against him should be for the value only of the use, for he cannot waive the term without renouncing the executorship.

Tilney v. *Norris,* (1700) 1 L. Raym. 553, 1 Salk. 309, Cath. 519. 12 E. R. C. 49, was covenant against an administrator for breach in his time of a covenant in the lease to the intestate to keep in repair, alleging that the estate had come to the defendant, and judgment was given against the defendant of his own goods as an assignee of the term, admitting that if sued as administrator the judgment would have been against the goods of the deceased.

Buckley v. *Pirk,* (1711) 1 Salk. 316, was covenant against the executor of a lessee for breach of lessee's covenant to repair, broken after testator's death, to which defendant pleaded no assets beyond a judgment already recovered by another creditor, and it was held that while the covenant runs with the land so that the defendant would have been liable had the plaintiff elected to charge defendant as assignee, yet having elected to charge as executor, the plea was good, as to everything but the profits of the term, as to which appropriation to any other purpose without payment of the rent, etc., was a devisavit, for which defendant was personally liable.

Lyddall v. *Dunlapp,* (1742) 1 Wils. 4, holds plene administravit no plea to an action against an executor for rent accruing in his own time, for he is personally liable as assignee for such rent.

Rubery v. *Stevens,* (1832) 4 Barn. & Ad. (24 E. C. L.) 241, was covenant by the reversioner against the executor of the tenant, for rent accruing since the decease, to which the defendant pleaded possession only as executor and that the premises were of no value, and on finding them worth part the rent, and on motion for nonsuit, Denman, C. J., held it clearly settled that the executor could not waive the term and accept the office, and if he enter he is liable of his own goods prima facie for the whole rent, subject to special plea and proof that the premises were of less value than the rent, in which case his personal liability is limited to the value of the profits.

Reid v. *Tenterden,* (1833) 4 Tyrw. 111, was covenant against an executor as assignee, for breach of the covenants to pay rent and make

repairs, and his plea that the profits were less than the demised rent and had all been paid to the plaintiff was held bad on demurrer for failure to allege that more could not have been realized and that there were no other assets during any of the time.

Nation v. *Toser,* (1834) 4 Tyrw. 561, was use and occupation against two executors and for rent accruing since the death of the testator under a lease to him for years, and on general issue and special plea that the defendants should be chargeable as executors only and that they had fully administered, it was proved that one had entered; but the judges agreed that while entry by one is entry for all for purpose of gift, sale, payment, etc., entry by one is not sufficient to charge another personally for use and occupation, and rule for nonsuit was accordingly made absolute.

Wollaston v. *Hakewill,* (1841) 3 Man. & Gr. (42 E. C. L.) 297, holds that an executrix of an executor, by merely probating the will of the first testator, became liable as assignee to pay rent and make repairs under the covenants in the lease to the first testator, without any entry.

Hopwood v. *Bayley,* (1848) 6 C. B. 744, 18 L. J. C. P. 43, 6 D. & L. 342, 12 Jur. 1088, 12 E. R. C. 50, was debt alleging that plaintiff leased to "W." for 21 years, reserving rent, which term came to defendant by assignment, after which rent accrued unpaid, to which defendant pleaded that he should be charged only as executor of "W," had no assets, and the term was of no value. The jury found the executor could have sub-let the premises for two-thirds of the reserved rent, and judgment was given against defendant for that amount, the court saying it was immaterial that he did not make avail of it.

Kearsley v. *Oxley,* (1864) 2 Hurl. & Colt. 896, holds an attempt to charge the husband of an administratrix as assignee for rent well answered by a plea that neither defendant nor wife have entered, or by plea that plaintiff has already recovered against administratrix as such, whereby he is estopped to sue them as assignees.

In re Bowes, (1887) 37 Ch. D. 128, was an attempt to charge an executor as assignee under a lease to the testator, in a proceeding to administer the estate, and while not maintainable, North J., discusses at length the liability of the executor as assignee, and says it is the amount that could have been realized, but the liability of the estate is to all creditors for the full amount so far as there are assets.

Rendell v. *Andreae,* (1892) 61 L. J. Q. B. 630, was an action for personal judgment again an executor as assignee of a lease to the testator, for five quarters of rent accrued since the death of the testator; and to plaintiff's contention that the defendant was personally liable by reason of proving the will without averment or proof of actual entry, Smith, J. said: "It will be seen that if this proposition be well founded, it follows that an executor cannot prove a will without becoming personally liable upon the covenants of his testator to pay rent and repair for the residue of the term unexpired at the date of the testator's death—a position I was not aware an executor placed himself in by merely proving the will. It is true that the leasehold estate of a bankrupt vests absolutely in the trustee upon his appointment: *Titterton* v. *Cooper,* (1882) L. R. 9 Q. B. D. 473, 51 L. J. Q. B. 472. But he can if he likes disclaim, whereas an

executor cannot. Mr. Muir Mackenzie said that the executor could assign; but if, as in the present case, the premises had been leased at a rent far above their value, and are situated in a neighborhood fast deteriorating in value, I do not see where the assignee is to be found to take the liabilities off the shoulders of the executor, unless he be a man of straw, and the whole affair a bogus one, though I am aware that there are cases in which this class of procedure has been upheld: *Taylor* v. *Shun*, (1797) B. & P. 21." He held entry necessary to render the executor personally liable.

Whitehead v. *Palmer*, (1908) 1 K. B. 151, 97 L. T. 909, 24 L. T. R. 41, 77 L. J. K. B. 60, was a claim against a defendant as administrator and alternatively in his personal capacity by reason of his possession under order of the court as special administrator to collect the goods till contest over appointment of a general administrator could be determined, during which time rent accrued under a lease to deceased, and later the lease was declared forfeited for non-payment of the rent, while defendant was endeavoring to sell the lease at a premium, and plaintiff did later rent it at a premium. The court held the defendant personally liable, not from the death of intestate, but for the period of his actual occupation, not at the reserved rent, but at what they would have brought for that period on a reasonable yearly rental, finally adopting the reserved rental in the lease for lack of better proof of value, and saying that for the period of occupation after notice of the forfeiture for non-payment of the rent he was liable the same as a trespasser for mesne profits.

Inches v. *Dickinson*, (1861) 2 Allen (84 Mass.) 71, 79 Am. Dec. 765, sustained a judgment against an administrator personally for the rent of premises since the death of the intestate, prima facie for the full rent reserved in the lease subject to proof that the use was worth less, he having kept the goods of the deceased on the premises and sold them out at auction there. "He is made responsible personally solely by virtue of his entry and possession."

In Matter of Galloway, (1839) 21 Wend. 32, 34 Am. Dec. 209, was certiorari on an attachment of the property of an administrator as an absent debtor; and it was held that while ordinarily an administrator is not liable in this form, the receipt of rents by him under a lease to intestate was equivalent to an entry to make him personally liable to the lessor on the covenant to pay the taxes for recovery of which the attachment was issued.

Becker v. *Walworth*, (1887) 45 Ohio 169, 12 N. E. 1, was an action against an executor for rent accruing since the death of the testator on a lease to the testator, and it appeared that although defendant had collected on sub-leases more than the rent accruing to the plaintiff he had applied it to other debts of the estate which turned out insolvent; and it was held that signing receipts for rent to defendant as executor did not stop plaintiff holding him as assignee in law for the rent up to the value realized from the term, and the payment to other creditors was misappropriation and no defense.

Liability merely as assignee by the estate or by the executor can and should be limited and terminated by assigning over the undesirable lease.

Lekeux v. *Nash,* (1745) 2 Strange 1221, held proof that the assignment was to a prisoner in the Fleet prison for a consideration loaned to him by the assignor for that purpose, was immaterial, and no proof of fraud, for by any assignment of the term the liability of the assignor on the covenants of the leases are terminated.

Rowley v. *Adams,* (1839) 4 My. & Cr. (18 Eng. Ch.) 534, 9 L. J. Ch. 34, the chancellor affirmed an order of the master of the rolls that executors exonerate the estate from liability for rents under a lease assigned to testator and by him devised to one who refused to accept it as not worth the rent, the rents having accrued after the master had ordered the executors to do what they could to relieve the estate from the liability, and the executors having merely endeavored to persuade the lessor to accept a surrender, and having made no attempt to make an assignment, by which the liability of the estate by virtue of privity of estate might have been terminated.

See also *Rendell* v. *Andreae,* (1892) 61 L. J. Q. B. 630, above stated.

MUTUAL ASSENT IN THE FORMATION OF CONTRACTS

By Samuel Williston[1]

It is a commonplace of the law that mutual assent is necessary for the formation of contracts, at least unless they are under seal. How far formal contracts are governed by this principle will not now be considered, but merely the meaning of the principle so often laid down as elementary in the law of simple contracts.

As is too often the case in the law, though the words in which the principle is stated have become indisputable commonplace, their fundamental meaning is unsettled. The point of dispute is whether actual mental assent of the parties is a legal requisite, or merely such an expression by them as would normally indicate assent, whatever may have been in the minds of the parties. Is the test objective or subjective?

Cases in debt or assumpsit until near the end of the eighteenth century have very little discussion of assent as the basis of contract. In debt it was essential that the defendant should have received a "quid pro quo"; in assumpsit it was necessary that the plaintiff should have furnished consideration at the request of the defendant. These tests seem external, and certainly there is very little in the early cases to contravene the well known dictum of Brian, C. J., that "the thought of man is not triable for the devil himself knows not the thought of man";[2] but near the end of the eighteenth century, and for the ensuing half century, the prevalent theory of contract evidently involved as a necessary element actual mental assent. External acts were merely necessary evidence to prove or disprove the requisite state of mind.

This is shown most clearly in the assumption that an offer to sell specific property was necessarily revoked by the sale of the

1. [Born in Cambridge, Mass., September 24, 1861; A. B. Harvard, 1882, LL. B. and A. M. 1888, LL. D. 1910. Admitted to the Bar of Massachusetts, 1888; practiced law in Boston, 1889-1912; assistant professor of law in the Harvard Law School, 1890-95; professor, 1895—. He is author of an authoritative treatise on "Sales" (1909), and of numerous articles in legal periodicals; editor of eighth edition of Parsons on "Contracts," third edition of Wald's "Pollock on Contracts," Stephen on "Pleading"; and has published case-books on contracts, sales, and bankruptcy, now in use in the leading law schools of the United States. The author has more than once shown how the law school expert can be of practical service to the legal profession. He is especially known for his constructive work as draftsman of the uniform laws on sales, warehouse receipts, bills of lading, and certificates of stock.—ED.]

2. Y. B. 17 Edw. IV 1.

property to a third person, though the offeree had no knowledge of the sale and accepted the offer within the limit of time fixed by it.[3]

The conception is also made manifest by the difficulty which the courts at that time experienced in giving effect to a continuing offer. It is obvious that an offer can be good evidence of the offeror's state of mind only at or about the time when the offeror spoke. If, therefore, the object of inquiry is the mental attitude of the offeror at the time of an acceptance, an offer which has continued for considerable time will be irrelevant. This will be true even though the offeror in terms stated that the offer would remain open for the period in question. For, notwithstanding the offeror should say that he would be of the same mind six weeks hence, it might well be that he would change his mind.[4]

It was rather on account of the necessity of the situation than because logical requirements were thought to be satisfied that it was held in *Adams* v. *Lindsell*,[5] that mailing a letter of acceptance completed a contract proposed by a letter sent through the post.[6] The terms coming into use at this time of "meeting of minds," and "notice" of acceptance and of revocation contain the same implication that the attitude of mind of the parties is the ultimate fact to be proved, and that their acts are merely evidence of it.

3. This assumption was made in *Cooke* v. *Oxley*, 3 T. R. 653 (1790); *Adams* v. *Lindsell*, 1 B. & Ald. 681 (1818); *Head* v. *Diggon*, 3 Man. & Ry. 97 (1828); *Routledge* v. *Grant*, 4 Bing. 653 (1828).

4. See cases cited in the preceding note, also *Kennedy* v. *Lee*, 3 Meriv. 441, 454, where Lord Eldon said:

"I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute."

It will be noticed that Lord Eldon would permit the offeror to state within a reasonable time after receiving the acceptance, that he no longer agreed to the proposal originally made by him, and if he did so there would be no contract.

5. 1 B. & Ald. 681 (1818).

6. In often-quoted words the court answered the argument that until the letter of acceptance was received, there could be no binding contract: "if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum."

It will be observed that it is only the court's assumption that simultaneous mental assent is a requisite of a contract which creates any logical difficulty. To modern thinking a requirement that the acceptance should be received would not involve the conclusion that the offeror must then accept the acceptance, and so go on ad infinitum.

At the present time courts of law at least—more clearly perhaps in America than in England—have generally turned from this theory of contracts which was emphasized during the half century or more following the year 1790, and have expressly or by implication asserted that the words and acts of the parties are themselves the basis of contractual liability, and not merely evidence of a mental attitude required by the law. In other words, that an expression of mutual assent, and not the assent itself, is the essential element of contractual liability. Students seek for a reason why a letter of acceptance is effective when mailed, while a letter revoking an offer is ineffective until received. The actual reason for the distinction is that the former rule was settled in the early part of the nineteenth century, and the latter rule not until the second half of the century. Had the question been squarely raised prior to 1850, there can be little doubt that mailing a letter of revocation would have been held sufficient.[7] Sometimes the modern view is clearly expressed;[8] but frequently the old modes of expression are persisted in. It is not, however, the mode of expression of courts which is of vital moment, but what they do. It is sometimes supposed that the results of the modern cases can be achieved without discarding the older theory and that the difference between a subjective and an objective test is merely one of phraseology. This may be true if it is admitted that the expressions of assent or dissent indicated to one another by the parties' words or acts are not only evidence of their mental attitude, but the only permissible evidence and, when clearly indicative of a certain state of mind, conclusive evidence thereof. If this is admitted, however, it is still true

7. See the English decisions cited in note 3 supra. The California Civil Code, which was drafted before it had been decided that a letter of revocation must be received, expresses the early doctrine, and in California and in states which have adopted the provisions of the California Civil Code, it seems that a letter of revocation is effective from the time of its mailing: *Watters* v. *Lincoln*, 29 S. Dak. 98, 135 N. W. 712.

8. *In Hotchkiss* v. *Nat. City Bank*, 200 Fed. 287, 293, L. Hand, J., said: "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort."

In *O'Donnell* v. *Clinton*, 145 Mass. 461, 463, 14 N. E. 747, Holmes, J., for the court said:

"Intention is immaterial till it manifests itself in act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."

that it is undesirable to state the law in terms of conclusive presumptions. If fact A can be shown only by fact B and is to be conclusively presumed from fact B in every case, it is well to recognize that fact B is material, and fact A immaterial. But the difference is not merely in terminology. On the one side it would be contended that expressions of assent and dissent should be immaterial unless communicated to the other party.

On the other side, it would not be universally admitted that expressions of the parties to one another by way of offer, acceptance, rejection, or revocation, at the time they enter into the transaction in question are always conclusive of the assent or dissent which the law regards. Though it would be conceded that the words and acts of the parties in dealing with one another are generally conclusive, yet within not very exactly defined limits the mental assent or dissent of the parties though not expressed in words or acts is deemed material by those who apply a subjective test.

Perhaps a common view, though not often exactly formulated, would regard the formation of contracts as dependent in many cases upon estoppel. According to this view, if the parties actually assented to the transaction which their words or acts indicated, a contract would be formed because of this assent. If one of them did not actually assent, but his words or acts indicated that he did, the other party relying on these words or acts could hold him bound because estopped to deny the existence of a contract. The difficulty with this explanation is that estoppel requires detrimental action in reliance on the erroneous statement and a party's mere supposition that he has made a contract can hardly amount to such detrimental action. If in reply to an offer by mail the offeree mailed an acceptance within the period permitted by the offer, under existing law a contract would be formed though the offeree had mailed a revocation prior to the mailing of the acceptance. Surely it cannot be said that mailing the acceptance five minutes before the revocation arrived, is basis for an estoppel.

The single well-established rule that an acceptance mailed before receipt of a revocation which, however, was mailed before the acceptance was mailed, creates a contract, without regard to any action by the acceptor in reliance on the mailing of his own acceptance (if indeed under the subjective test he would be justified in

acting in reliance thereon), makes it impossible to sustain the subjective theory.[9]

The parol evidence rule re-enforces the conclusion. The analysis of Thayer[10] and of Wigmore[11] has shown that the parol evidence rule is primarily a rule of substantive law rather than of evidence; that is, in its application to contracts it fixes by an external standard the scope of the contract. The objection to proving intent or agreement at variance with the writing does not relate to the character of proof; the fact itself, of which proof is attempted, is immaterial. No evidence or admission will alter the application of the rule that the writing, not the intent of the parties, even though otherwise expressed, defines the terms of the contract.

So far have the decisions gone in recognizing the objective test of mutual assent, that not only negligent expression of assent without actual assent will bind parties contractually,[12] but an expression of assent without negligence may sometimes have the same effect. Thus, if either party instead of communicating an offer or acceptance to the other party directly, makes use of an intermediary who makes a mistake in the words transmitted, the words as actually transmitted, are binding on the party employing the intermediary. "When two parties who speak different languages and cannot understand each other, voluntarily agree upon a third person to translate for them, they make the interpreter their agent, so that each has a right to rely on the communication made to him by the other party through his representative."[13] So if one party

9. An acceptance prior to a communicated revocation will make a binding contract: *Stevenson* v. *McLean*, 5 Q. B. D. 346; *Henthorn* v. *Fraser* [1892], 2 Ch. 27; *Re London & Northern Bank* [1900], 1 Ch. 220; *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. ed. 187; *Patrick* v. *Bowman*, 149 U. S. 411, 424, 37 L. ed. 790; *The Palo Alto*, 2 Ware 343; *Weld* v. *Victory Mfg. Co.*, 205 Fed. 770; *Kempner* v. *Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Sherwin* v. *Nat. Cash Register Co.*, 5 Col. App. 162, 38 Pac. 392; *Wheat* v. *Cross*, 31 Md. 99, 1 Am. Rep. 28; *Brauer* v. *Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Farmers' Handy Wagon Co.* v. *Newcomb*, 192 Mich. 634, 159 N. W. 152; *Malloy* v. *Drumheller*, 68 Wash. 106, 122 Pac. 1005.

10. "Preliminary Treatise on Evidence," p. 390.

11. *Wigmore* on "Evidence," IV, § 2400.

12. For example, where a writing is signed or accepted without examination. See *Williston*, "Sales," § 654.

13. *Bonelli* v. *Burton*, 61 Ore. 429, 123 Pac. 37, citing, *Sullivan* v. *Kuykendall*, 82 Ky. 483, 489, 56 Am. Rep. 901, and *Miller* v. *Lathrop*, 50 Minn. 91, 93, 52 N. W. 274, and adding further:

"An interpreter selected by adverse parties, who speak different languages and cannot understand each other, being the agent of both, his representations, made in their presence and hearing, in communicating to one what purport to be the expressions of the other, related in the regular course and prior to the termination of the business, are chargeable to each; and the other is entitled to rely on such representations."

using a telephone asks the operator to repeat the message to a third person, the offeror is bound by the words of the operator though they do not agree with the instructions given.[14]

So where a telegraphic offer is sent and the telegraph company transmits the message inaccurately, the offeror is treated as having made the offer in the form in which it was received by the offeree.[15]

These results cannot be rested on estoppel, because no action in reliance on the offer or promise which varies from the mental intent of the party who makes it is requisite, other than the giving by the other party of his own assent to the transaction; and if it be said that this is sufficient to create an estoppel the reply is obvious that under the misleading name of estoppel the objective test has been adopted.

But the cases go farther than has yet been indicated. The parties may be bound by the terms of an offer even though the offeree expressly indicated dissent, provided his action could only lawfully mean assent. A buyer who goes into a shop and asks and is given the price of an article, cannot take it and say "I decline to pay the price you ask, but will take it at its fair value." He will be liable, if the seller elects to hold him so liable, not simply as a converter for the fair value of the property, but as a buyer for the stated price.[16]

---

14. *Sullivan* v. *Kuykendall*, 82 Ky. 483, 489, 56 Am. Rep. 901.

15 *Western Union Telegraph Co.* v. *Shotter*, 71 Ga. 760; *Western Union Telegraph Co.* v. *Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Ayer* v. *Western Union Telegraph Co.*, 79 Me. 493, 1 Am. St. Rep. 353; *Wilson* v. *M. & N. W. R. Co.*, 31 Minn. 481, 18 N. W. 291; *Haubelt* v. *Rea & Page Mill Co.*, 77 Mo. App. 672; *Howley* v. *Whipple*, 48 N. H. 487.

But see the contrary decisions of *Henkel* v. *Pape*, L. R. 6 Ex. 71; *Verdin* v. *Robertson*, 10 Ct. Sess. Cas. (3d series) 35; *Western Union Telegraph Co.* v. *Anniston Cordage Co.*, 6 Ala. App. 351, 59 So. 757; *Jackson Lumber Co.* v. *Western Union Tel. Co.*, 7 Ala. App. 644, 62 So. 266; *Postal Tel. Co.* v. *Schaefer*, 110 Ky. 907, 62 S. W. 1119; *Shingleur* v. *Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604; *Pepper* v. *Telegraph Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699. See also *Penobscot Fish Co.* v. *Western Union Tel. Co.* (Conn.) 98 Atl. 341.

The question has been disputed on the continent of Europe also. See *Lyon-Caen* et *Renault*, "Traité de Droit Commercial," Vol. III, § 23.

If, however, the receiver of the telegram ought to have known that there must have been a mistake in the wording of the telegram, from his knowledge of the market, or for other reasons, he cannot, by accepting, bind the offeror: *Germain Fruit Co.* v. *Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575. The telegram, as received, offered Riverside oranges at $1.60 a box. The market price was $2.60. See also *Central of Georgia Ry. Co.* v. *Gortatowsky*, 123 Ga. 366, 51 S. E. 469; and the same principle is applicable in any case where the offeree must know that the terms of the offer are unintended or misunderstood by the offeror. No contract based on the offer can be enforced by the acceptor.

16. See *Lucy* v. *Mouflet*, 5 H. & N. 229, 232; *Wilcox* v. *Rogers*, 13 Ga. App. 410, 79 S. E. 219.

So where a check is sent in satisfaction of an unliquidated claim, the creditor if he takes the check has contracted to take it in satisfaction of his claim even though, while taking the check, he expressly declines to treat it as full payment.[17] So a debtor who owes several distinct debts may, in making a payment on account, specify to which debt the payment shall be applied. The creditor's assent is immaterial; he must apply the payment as directed if he keeps it.[18]

Where the words of an agreement are ambiguous, it is doubtless true that the intent of the user of the words may be sought.[19]

But intention is sought here not because it is primarily important but in order to show the true nature of the external act.[20]

It is true also that one who attaches his name to a document purporting to be a contract, may show that it was not his act because he was forcibly compelled to sign it.[21]

Or because a paper was by trick substituted for that which he, without negligence, supposed he was signing.[22]

But these decisions merely involve the question of what is the promisor's act, not the question whether the promisor's act or his intent is the essential element of contract.

Doubtless there are many expressions, and some scattered decisions in courts of law which are at variance with the theory here advanced. Especially it seems undisputed that the death either of the offeror or offeree before the completion of a contract though unknown to the other party precludes the possibility of completion. Death is an overt act, but it is not necessarily communicated. These cases are, however, equally inconsistent with the theory which would support, on the ground of estoppel, a contract made by an acceptance of an offer which did not accurately express the offeror's intention, and it should be noticed that the effect of unknown death upon an offer has not escaped criticism;[23] and on the analogous

17. See *Wald's* "Pollock on Contracts" (3d ed.), p. 838; *Hirachand-Punamchaud* v. *Temple* [1911], 2 K. B. 330; *Canton Union Coal Co.* v. *Parlin*, 215 Ill. 244; *Worcester Color Co.* v. *Henry Wood's Sons Co.*, 209 Mass. 105, 95 N. E. 392; *Decker* v. *Smith*, 88 N. J. L. 630, 96 Atl. 915.

18. *The Memnon*, 62 Fed. 482, 10 C. C. A. 502; *Lynn* v. *Bean*, 141 Ala. 236, 37 So. 515; *Hanson* v. *Cardano*, 96 Cal. 441, 31 Pac. 457; *Reed* v. *Boardman*, 20 Pick. 441; *Goodman* v. *Snow*, 81 Hun. 225.

19. As in the well known "Peerless" case, *Raffles* v. *Wichelhaus*, 2 H. & C. 906.

20. See *Holmes*, "Common Law," 309.

21. That is, his hand and not merely his mind was subject to compulsion. See *Fairbanks* v. *Snow*, 145 Mass. 153, 154, 13 N. E. 596, 1 Am. St. Rep. 446.

22. *Williston*, "Sales," §§ 625, 654.

23. The similar rule in the civil law has been changed by the German Civil Code, § 153.

question of an offer or acceptance by an insane person, the English courts and many American courts have gone very far in supporting the liability of the lunatic on the contract.[24]

Indeed so clearly have the decisions and the language of courts in recent years upheld the objective test in actions at law, that it might be unnecessary to labor the point were it not for the decisions of courts of equity, and especially the reasoning used to support them.

The jurisdiction of equity to rescind and to reform contracts on account of mistake is often, if not usually, rested on the argument that where a contract is rescinded for mistake, the so-called contract is not actually such because the minds of the parties were not in accord, and that where a contract is reformed, equity is merely establishing the real contract which the parties made, because they intended to make it, and substituting it for an apparent contract.[25]

Such a theory is necessarily based on the assumption, and, if carried out by the courts supports the assumption, that mental assent is the vital element in contracts; and English text writers, at least, on the jurisdiction of equity, plainly state this.[26] Such a theory, however, is unnecessary to support the jurisdiction of the court, and indeed cannot be consistently carried out without violating actual law and good sense. There is no reason why a court of equity should not set aside a contract which the parties have made whenever it is just to do so. Equity unquestionably exercises this juris-

24. See *Williston*, "Sales," § 33.

25. This idea is clearly expressed in an article by *E. H. Abbot, Jr.*, Harv. L. Rev., XXIII, 608. See also 20 Am. & Eng. Encyc. (2d ed.) 809.

26. In *Morrison*, "Rescission of Contracts" (London, 1916), p. 162, the author says:

"Once it is conceded (and it must be conceded) that the law is concerned with the real intention of the parties as distinguished from their intention as manifested by the written document, it becomes a question of the evidence sufficient to establish the real intention of *each* of them."

In *Ashburner*, "Equity" (London, 1902), p. 369:

"If 'A' offers to sell Whiteacre to 'B' for £1,000, and in his offer writes sell when he meant let, or Whiteacre when he meant Blackacre, or £1,000 when he meant £2,000, his mistake lies in a discrepancy between his mental offer and his outward expression; and although 'B' accepts in the bona fide belief that 'A' meant what he has written, there is not in reality a concluded contract between the parties. If 'A' is bound to carry out his written offer, he is bound not on the ground of contract, but on the ground of estoppel; and there seems no reason why he should be bound unless 'A' ['B'] has altered his position on the faith of the apparent offer."

It is submitted, however, that the courts have not accepted the logical consequence of the writer's premise that "A" has not made a binding contract, although "B" has not altered his position. A refusal of equitable relief to "B" is another matter and so is even giving "A" the affirmative right of rescission, involving as it does the distinction between voidable and void transactions.

diction when a contract is procured by fraud, and its jurisdiction to rescind a contract for mistake is entirely analogous. And when parties have intended to make a certain contract or conveyance and have failed to do so, it is not necessary to assert that their intention of itself created a contract or conveyance in order to justify a court in imposing on the parties the consequences of an act which they intended but did not do.

It cannot be admitted that equity has a different fundamental theory of the elements of contract from that obtaining in courts of law. Equity professes to accept the legal conception of a contract; and indeed with the administration of legal and equitable remedies confided to the same hands, as is now common, it would be as difficult as it is objectionable to have two definitions. If attention is fixed not so much on what courts of equity have said as on what they have done, it is clear that they, like courts of law, have adopted an objective standpoint. It should be considered:

(1) If the subjective theory were adopted, it would follow that in any case involving misunderstanding, that is, a variance between the mental images of the proposed transaction formed by the parties,

(a) There would be no occasion for the jurisdiction of equity. The agreement would be as invalid at law as in equity. The parol evidence rule does not forbid any proof which tends to show that no contract ever arose between the parties. It is true that the jurisdiction of equity to guard against a possible misuse of an apparent contract or conveyance might sustain occasional applications to the court on the principle of quia timet, but the bulk of decisions cannot be explained in this way.

(b) Any mistake, as to the meaning of the terms of the agreement, whether small or great, would have the effect of preventing a contract. An offer and acceptance must agree not simply in the most important matters, but in every particular. If the court is seeking mental assent it must find that assent in all details.

(c) The fact that a mistake was favorable to the party making it would be immaterial.

(d) Negligence of a party subject to a misunderstanding would be immaterial in the absence of estoppel.

(e) Restoration by the plaintiff of the status quo could not be a condition of relief. The existence or non-existence of a contract cannot depend upon that. If no contract exists the

appropriate remedy for the restoration of the consideration would be an action by the defendant based on quasi-contractual principles.[27]

2. Finally, the parol evidence rule is applicable in equity as well as at law. Where a case of fraud is alleged, or such mistake as equity deems a basis for relief, or a defense to a suit for specific performance is made out, the parol evidence rule is disregarded because equity will not allow it to work injustice.[28]

But aside from such cases, the memorials of the parties which they have agreed upon as the external expression of their will, establish the terms of the contract as conclusively in equity as at law.[29]

If the fundamental nature of equity procedure is kept in mind there will be little difficulty in harmonizing the apparent conflict of the statements by courts of law and courts of equity. When a court of equity says that one who has not the legal title to land is, nevertheless, the owner in equity, it is not denying rules established by courts of law or perhaps by statute for the transfer of real estate; it is saying that one who is confessedly not the real owner should be given the rights of an owner as against a certain person or persons.

So in dealing with contracts and conveyances made under a mistake, equity frequently denies one who has a legal contract or conveyance, the right to enforce it (rescission) and subjects one who has made no legal contract or conveyance, to the same obligations as if he had (reformation) or combines the two forms of relief. The practical importance of the distinction between this explanation of the action of a court of equity and that which is criticized is two-fold:

1. Where a conveyance is in question, the rights of a bona fide purchaser for value are recognized even though no estoppel could be found, e. g., where the conveyance made under a mistake is not recorded or seen by the purchaser.

2. Even where a non-negotiable executory contract is in question, under which an assignee could get no greater legal rights than his assignor, a court of equity is enabled to consider all the circumstances making it equitable or not to afford relief. If the question turned simply on what was the contract between the parties, only

27. See *Pomeroy*, "Eq. Jur." (3d ed.) II, § 856.
28. *Tabor* v. *Cilley*, 53 Vt. 487.
29. *Sawyer* v. *Hovey*, 3 Allen, 331, 333; *Ferry* v. *Stephens*, 66 N. Y. 321, 324; *Vermont Marble Co.* v. *Eastman*, 91 Vt. 425, 101 Atl. 151, 161.

facts bearing on that issue would be pertinent. Negligence, lack of consideration for a sealed contract, lack of injury from the mistake, effect on the rights of third parties, would be of no consequence.

The theoretical importance of the distinction in question is equally great. It furnishes a key to decisions at law and in equity which at first sight may be thought antagonistic, and combines them as parts of a harmonious system.

Some might admit that liability was created in the cases that have been used to prove the validity of the objective test, but would deny that the liability is contractual, and assert that it is quasi-contractual. That the liability is imposed by law is doubtless true. On no view can any liability be imposed in any other way. To distinguish into two categories obligations imposed by law in accordance with the mental assent of the parties, and obligations imposed by law in accordance with the natural meaning of the acts of the parties but without mental assent, is undesirable unless the law attaches consequences to one category which it does not attach to the other, and it is the thesis of this paper that such is not the case. Equity may indeed grant relief in certain cases from a contract to one who apparently assented thereto without actual mental assent, and may deny the adverse party a remedy for the enforcement of the contract though the acts of the parties indicated assent, but equity will not do this universally in such cases; and, therefore, to form a separate category of all cases of expressed or apparent mutual assent when there was no mutual mental assent is as misleading in equity as at law.

LIBERTY OF TESTATION AND SOME MODERN LIMITATIONS THEREON

By Orrin K. McMurray[1]

There is probably no institution of private law concerning which there has been more discussion in the modern world than the will. Only recently one of the leading legal scholars of England has spoken of "the more than doubtful justification usually put forward for its maintenance."[2] On the other hand, Sir Henry Maine places the will by the side of the contract as one of "the two great institutions without which modern society can scarcely be supposed capable of holding together."[3] If the writings of older writers are examined, we find an equal divergence of opinion as to the justification and theory of testamentary disposition. Leibnitz connects the institution with the doctrine of the immortality of the soul.[4] Grotius finds for the testament a basis in natural law, and supports the law of intestate succession by reason of its agreement with the presumed will of the owner.[5] He would therefore allow the freest power of testamentary disposition, beyond a reasonable amount reserved by law for the support of children. Pufendorf, whom our own Blackstone follows, finds the will merely to be a contrivance of positive law, not as Grotius thought founded in natural law. To him, however, as to his predecessor, the law of descent and succession is the expression by law of the presumed will of the owner.[6] The notion that the testament is a means of transmission of private ownership from the testator to his beneficiaries is the starting point for the theories of the jurists of the

1. [Born, San Francisco, California, November 25, 1869; Ph. B., University of California, 1890, LL. B., Hastings College of the Law, 1893; assistant professor, associate professor and professor of law, School of Jurisprudence, University of California, 1903—; editor-in-chief California Law Review, 1912—.—ED.]

2. *Jenks,* "English Civil Law," Harvard Law Review, XXX, 119.

3. *Maine,* "Ancient Law" (Pollock's ed.) 214-215.

4. "Testamenta vero mero jure nullius essent momenti nisi anima esset immortalis. Sed quia mortui re vera adhuc vivant, ideo manent domini rerum, quos vero heredes reliquerunt, concipiendi sunt ut procuratores in rem suam": *Leibnitz,* "Nova Methodus Discendae Docendque Jurisprudentiae," Part ii, § 20. His view is adopted by *Ahrens,* "Cours de droit naturel," 7th ed. II, § 102.

5. "Ex coniectura voluntatis naturalem habet originem": *Grotius,* "De Jure Belli ac Pacis," ii, c. 7. See the description of the natural law theory of testamentary succession in *Maine,* "Ancient Law," 190.

6. "Inventum juris positivi": *Pufendorf,* "De Jure Naturae et Gentium," iii, cc. 10 11; *Ahrens,* ubi supra.

seventeenth and eighteenth centuries. From the right of the individual to transfer his property during his lifetime is deduced the right of testamentary disposition. Writers of this school are therefore disposed to approach the will from the point of view of conveyancing—the viewpoint of the English law. They regard intestate succession as a substitute for the will, what the decedent would have expressed as his will, had he made one.[7]

With the French revolution, these theories are greatly altered. "What is a testament?" exclaims Mirabeau. "It is the expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law."[8] It would be difficult to find in the annals of legal debate a more dramatic scene than the reading by Talleyrand of this eloquent address before the National Assembly on the 2nd of April, 1791. The author, himself the disinherited victim of an arbitrary father, lay still in death, while his voice as from the grave inveighed against the power of testamentary disposition as contrary to the dictates of humanity.[9] And there can scarcely be found a better example of the folly of a purely rationalistic treatment of a great and ancient legal institution than is afforded by the fact that Mirabeau made a death-bed will on the very morning of the day that Talleyrand read his "testament politique."[10] The same inconsistency has been charged to Plato, who like Mirabeau criticized the will, and like him died testate.[11]

If the preference for testamentary freedom expressed by Grotius and the natural-law school tends to class the will in the field of property law, the theory which denies that freedom throws the institution into the field of family law. A philosophical expression of the latter view is found in Hegel, to whom the family is the basis for the entire law of succession. Practically he would deny liberty of testation where there are a wife and children, and would permit it only where there is no widow and no immediate descendants or ascendants.[12] In positive legislation, Mirabeau's views

7. *Bruns*, "Über Testirfreiheit und Pflichttheil," Zeitschrift für Vergleichende Rechtswissenschaft, II, 159, 166, reprinted in "Kleinere Schriften," II, 139.

8. "Discours sur l'égalité des partages," translated in *Bulwer*, "Historical Characters," I, 114. Cf. *Montesquieu*, "Esprit des Lois," 26, 6, 15.

9. *Boissonnade*, "Histoire de la réserve héréditaire," 494, 559.

10. *Boissonnade*, 60.

11. *Diogenes Laertius*, "Plato," cited by Boissonnade, 60.

12. *Hegel*, "Philosophie des Rechts," §§ 178-180, "Works," VIII, 234-240.

found expression in the short-lived act of the National Convention of 1793 which absolutely denied the right to make a will where there were descendants or ascendants.[13]

Later philosophical jurists of the natural-law school have not added to clearness of thought concerning inheritance and testamentary succession. One can scarcely avoid an expression of impatience at such a justification as that of Ahrens, who declares that "to refuse a man the right to make a will, is to treat him solely as a being of the senses, incapable of conceiving an object beyond this life, or to make him a living example of the maxim, après moi le déluge."[14] And one breathes a sigh of relief when he finishes reading such explanations as those of Trendelenburg and Lasson who square their philosophy of law with existing facts of German legislation.[15] Indeed, the value even of the earlier speculations of Grotius and Pufendorf is not because of their inherent merit, but for the reason that they have profoundly influenced the actual course of development of legal institutions. The theory of a law of nature was partly, though not consistently, adopted by Blackstone, and through him has affected current legal thought in the English-speaking world.[16] In fact, it is possible to some extent to trace the direct influence. The first chapter of the Commentaries is in large part textually a translation from Burlamaqui.[17] And the distinction made in the first chapter of the second book of Blackstone between the right of property arising from occupancy, designated as a natural right, and the right of succession, defined as a mere creature of positive law,[18] is doubtless borrowed from Pufendorf to whom Blackstone refers not only in this chapter, but in that on Title by Testament.[16] Difficult as it is to perceive an essential distinction of the sort made in this matter, it has been adopted by most American courts, including the Supreme Court of the United States,[19] as a legal basis for sustaining the constitu-

13. Decree of March 7, 1793, cited in *Boissonnade*, 356-357. This was very soon altered by the decree of 5 Brumaire, in the year II, which permitted one-tenth of a testator's property to be disposed of by will as against descendants or ascendants and one-sixth as against collaterals: *Brissaud*, "History of French Private Law" (Continental Legal History Series) 747.

14. *Ahrens*, II, 301.

15. *Trendelenburg*, "Naturrecht auf dem Grunde der Ethik," § 141; *Lasson*, "Rechtsphilosophie," § 54, 14.

16. On the influence of Grotius, Pufendorf, and Burlamaqui upon Blackstone, see *Glasson*, "Histoire du droit et des institutions de l'Angleterre," V, 399.

17. *Glasson*, ubi supra.

18. *Blackstone*, "Commentaries," II, 8, 490.

19. *Magoun* v. *Illinois Trust, etc., Co.* (1898), 170 U. S. 283, 292.

tionality of taxes on succession, and has become a commonplace of legal discussion. Statesmen and legislators as well as lawyers profess to be dominated by the theory of Pufendorf. Thus, Sir William Vernon Harcourt, introducing a bill for the imposition of death duties in Parliament, says: "Nature gives a man no power over his earthly goods beyond the term of his life; what power he possesses to prolong his will beyond his life—the right of a dead hand to dispose of property—is a pure creation of the law, and the state has the right to prescribe the conditions and the limitations under which that power shall be exercised."[20] The direct corollary of such a proposition is that the right of property itself is not a creation of positive law, but owes its existence to something beyond society. A theory so out of keeping with modern conceptions of the relation of the community to the individual, with social and economic needs, must seriously confuse legal thinking.

Evidences, however, are not lacking that the need for a more realistic method of dealing with legal notions is becoming apparent to our judges and statesmen, as well as to theoretical writers. When a judge declares, as does Lord Haldane in a recent case, that a "question belongs to a class becoming more and more prominent with the growth of modern scientific research into the foundations of the common law of England, in which the lawyer has to await the results of research by the historian and the jurist before he can be sure of his foundations,"[21] it may be hoped that the day is not far distant when a scientific method will have established its place in legal thought. For the application of such a method, involving what Dean Wigmore calls "the tracing of the evolution of universal legal ideas,"[22] a method which he had admirably applied in his study of the Pledge Idea,[23] succession and testamentary law offer a field rich in material and promising valuable fruit.

Viewed from the standpoint of the history of legal ideas the first phenomenon that impresses the observer is that the will is by no means a universal institution.[24] It was unknown to the early Greek law, as we find it in the laws of Gortyn.[25] It was also

20. Quoted by *Ely*, "Property and Contract in Their Relation to the Distribution of Wealth," I, 416.

21. *Hammerton* v. *Earl of Dysart* [1916] A. C. 57, 72 (H. L.).

22. "Sources of Ancient and Primitive Law," Preface, xi.

23. Harvard Law Review, X, 321, 389; XI, 18.

24. *Girard*, "Droit Romain," 4th ed., 789, note 4; *Bruck*, "Zur Entwicklungsgeschichte der Testamentsvollstreckung im römischen Rect," Zeitschrift für das Privat und Öffentliche Recht, XL, 545; *Post*, "Grundriss der Ethnologischen Jurisprudenz," II, 197.

25. *Kocourek* and *Wigmore*, "Sources of Ancient and Primitive Law," 453-464; *Post*, "Anfänge des Staats und Rechtslebens," 149.

unknown to the ancient law of India, to Egypt, to the older Jewish law, to the law of Babylon, modern as that law seems in many respects as presented in the code of Hammurabi.[26] Tacitus' description of the early Germans,[27] has been verified by what modern investigators have learned of the early Germanic law.[28] Professor Hübner says: "The very nature of the Germanic law of inheritance as a law of kinship based exclusively upon blood relationship, necessarily wholly excluded, originally, testamentary dispositions of the estate."[29] The Frankish "affatomie" and the Lombard "thinx" or "gairethinx" were essentially herital contracts, bilateral transactions, not like the will, unilateral and revocable.[30] Moreover, these institutions, primitive as they are, had been exposed to the influence of the clergy and of the Roman civilization which began to operate at a very early date upon the barbarian customs.[31] "The oldest utterance of English law that has come down to us has Greek words in it; words such as bishop, priest, and deacon."[32] The statement of earlier writers that wills of land as well as of movables were permitted under the Anglo-Saxon laws has been doubted by later scholars, who point out that the wills still extant are those of bishops and kings and do not demonstrate the existence of a general power to make wills.[33] Indeed, so far at least as the peoples of western Europe are concerned, the Romans alone seem to have evolved the conception of the testament as we now know it. In modern law it is an institute derived from the developed law of Rome, and transmitted to modern society through the influence of the church.[34]

The testimony of the customs of peoples less closely connected with European civilization than those just mentioned con-

26. As to India, see *Post*, "Grundriss," i, 197; Egypt, *Revillout*, "La propriété en droit égyptien," 152, 201; Hebrews, *Dareste*, "Études d'histoire du droit," 3, 47; the laws of Hammurabi, *Kocourek* and *Wigmore*, "Sources," 387 et seq.

27. "Germania," c. 20; *Kocourek* and *Wigmore*, "Sources," 106.

28. *Hübner*, "History of Germanic Private Law" (translated by Professor F. S. Philbrick in Continental Legal History Series) 697.

29. *Hübner*, 740.

30. On the unilateral character of the will see *Bruck*, Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Röm. Abt.), XXXII, 355, and *Hübner*, 744.

31. *Goffin*, "The Testamentary Executor in England and Elsewhere," 14.

32. *Pollock* and *Maitland*, "History of English Law," I, 1.

33. *Blackstone*, "Commentaries," II, 373; *Pollock* and *Maitland*, II, 326; *Jenks*, "Short History of English Law," 61.

34. *Holdsworth*, "History of English Law," II, 14; *Pollock* and *Maitland*, II, 314; *Schultze*, "Die Einflusz der Kirche auf die Entwicklung des germanischen Erbrechts," Zeitschrift der Savigny Stiftung (Germ. Abt.), XXXV, 75, 98; *Glasson*, "Le droit de succession au moyen âge," Nouvelle revue historique, XVI, 698, 773.

firms the conclusion that the law of intestate succession is older than that of testamentary disposition, and that the will is a comparatively modern institution.[35] It also confirms and fortifies in a striking way the history of the evolution of the will as portrayed in the history of the Roman law. In the case of peoples still in the patriarchal or joint family condition, the will is, of course, unknown.[36] Indeed, in such a society transfers inter vivos are equally impossible, and even descent and intestate succession can scarcely exist where ownership is communal.[37] Inheritance posits individual property and degrees of kinship. When the stage is reached where individual property emerges, substitutes are often found to perform the task which the will performs in our system. Thus, as we have seen, among the Lombards and Franks, dispositions of particular property to take effect after death were recognized. Among races so widely differing as the peoples of India, of the Caucasus, of the Semitic and Hamitic races of northeastern Africa is found the practice of making irrevocable donations mortis causa —if it is proper to speak of such modern arrangements in discussing archaic or primitive law.[38] The Babylonian law recognized transfers reserving a usufructuary right.[39] Frequently among peoples who employ the post obit transfer inter vivos to discharge the testamentary function, the right is confined to the acquisitions of transferor, and does not extend to the ancestral property.[40]

Side by side with the herital contract and the post obitum transfer, sometimes independently and sometimes merging with them, we find the system of adoption employed as a substitute for the will. China, the older Japan, ancient Egypt, the early Magyars, illustrate this custom.[41] The laws of Gortyn, the Attic and Spartan systems, the testamentum calatis comitiis of the early Roman law, all exhibit institutions whose purpose is the perpetuation of the personality

35. *Maine*, "Ancient Law," 190, 211; *Bruck*, Zeitschrift für das Privat und Öffentliche Recht, XL, 545.

36. *Post*, "Grundriss der Ethnologischen Jurisprudenz," II, § 43.

37. *Pollock* and *Maitland*, II, 250.

38. *Post*, ubi supra.

39. *Kohler* und *Peiser*, "Aus dem babylonischen Rechtsleben," II, 19.

40. A modern survival of this system was under the Russian lois civiles which permitted an absolute freedom of testamentary disposition as to all property, movable or immovable, other than the patrimonial estate, while it absolutely denied all testamentary power with respect to the last named property: *Lehr*, "Des successions testamentaires d'après les principaux codes de l'Europe," Revue de droit international et de législation comparée, XXXVIII, 144. Illustrations of this system in medieval French law may be found in *Brissaud*, "History of French Private Law," 738-739, and notes.

41. *Post*, II, 198.

of the deceased through the creation of an artificial kinship.[42] Usually the act of adoption in its earliest form is sanctioned by a general assembly, or by the members of the group; were it not an anachronism to speak of legislation in connection with early law, we might term it a legislative act. As a rule it is permissible only where the adopter is childless, and its purpose is closely connected with the performance of religious duties.[43] The Germanic laws, though they sometimes sanctioned adoption—which, however, never obtained a footing in the Anglo-Saxon branch—did not sanction it for the purposes of inheritance. Their maxim was, "Gott, nicht der Mensch, macht den Erben," or in the Latin phrase, "solus Deus heredem facere potest, non homo." The system of adoption practiced among the Ripuarian Franks and the Lombards shaded into the post obitum gift.[44] The conception of a universal transfer of rights and liabilities, however, was never attained by the Germanic laws; the transfers dependent upon death with which alone these laws were familiar were merely conveyances. The Roman will, on the other hand, began with family law and with the religious necessity of continuing the personality of the testator. It proceeds from the notion of a universal succession to duties as well as to rights. Indeed, succession to property is entirely unnecessary to the conception of the Roman will.

If the institution of the Roman will points to a religious origin —an origin that modern form-books suggest with their "In the

42. On the laws of Gortyn, see *Kocourek* and *Wigmore*, "Sources," 462—"And if (the adopted) take over all the goods and there dwell (?) not with him natural children, he shall perform the divine and human (duties) of the adopter and take them on himself as is written for natural children. And if he will not to perform them as is written, those belonging shall have the goods. But if there be natural children to the adopter, with the males (shall share) the adopted as the females have allotted to them from their brothers; and if there be no males, but females, the adopted (male) shall have an equal share; and he shall not be obliged to perform the duties of the adopter and to take to himself the goods, whatever the adopter have left; and more the adopted shall not come to." The reference to the adopter's right to renounce points to a question concerning which students of Greek law have differed, namely, whether children could renounce their inheritance: *Dareste*, "Nouvelles Études d'histoire du droit," 88-90. On the relation of adoption to testamentary law in Greece, see *Beauchet*, "Histoire du droit privé de la république athénienne," III, 691-697; in Rome, *Sohm*, "Institutes of Roman Law," translated by Ledlie, 3d ed., 542; *Girard*, "Droit Romain," 4th ed., 797; *Maine*, "Ancient Law," 210.

43. *Fustel de Coulanges*, "La cité antique," doubtless has exaggerated the religious influence. Cf. *Von Jhering*, "Die Vorgeschichte der Indo-Europäer," 62-71, for a criticism of de Coulanges.

44. *Hübner*, 661 says: "This Germanic adoption had no effects however within the law of inheritance." The heirless man alone could adopt. *Heusler*, "Institutionem des deutschen Privat-Rechts," II, 621; *Schröder*, "Lehrbuch der deutschen Rechtsgeschichte," 3d ed., 333.

name of God, Amen"—there are peoples of rudimentary culture for whom observance of the will of a decedent rests upon superstitious fear. Thus we are told that among certain Polynesian tribes, among the Papuans in New Guinea and negro tribes of East Africa, the wishes of the deceased are observed out of fear that his spirit may occasion sickness or earthquake or other evil.[45] On the other hand the same superstitious fear of the dead often induces the destruction of the property of the deceased.[46] The practice of suttee, which the British government in India suppressed in the last century, was doubtless connected with the destruction of the deceased's goods and found its counterpart in the early customs of other peoples. How the "dead's part" became subject to testamentary disposition, how fear of the evil spirit was changed to respect and worship, such are some of the problems that socio-legal science must investigate in an attempt to reach a better understanding of the elemental instincts of human nature upon which the institutions of inheritance rest.

Sir Henry Maine has traced the process by which the modern will, that is, a disposition of property taking effect at death only, secret or at least not public in its provisions, and revocable during the testator's lifetime, took the place of an institution illustrating the opposite of all these characteristics.[47] The plebean mancipatory will of the Romans rather than the patrician comital will, was the parent of the modern testamentary system of Europe and their extensions in the new world. The story as told by Maine has been amply verified in its essentials by later students.[48] Recently, it is true, distinguished Romanists have raised questions as to the nature of the earliest Roman will and as to the antiquity and character of the mancipatory will. Ehrlich has argued for a legatary character in the earliest will and has claimed that it was not essentially dominated by the conception of the heredis institutio;[49] Lenel has contended that the mancipatory will does not, as commonly supposed, antedate the Twelve Tables, and that it was similar in its nature to the "thingatio" of Lombard law, a post obitum gift

45. *Wilutzky,* "Vorgeschichte des Rechts," II, 178.

46. *Wilutzky,* 168, 169; *Brünner,* "Der Totenteil in germanischen Rechten," Zeitschrift der Savigny Stiftung (Germ Abt.), XIX, 107; *Gal,* "Totenteil und Seelteil," id., XXIX, 225.

47. *Maine,* "Ancient Law," c. 5 and 6.

48. *Pollock,* Notes to *Maine's* "Ancient Law," Note M.

49. *Ehrlich,* "Die Anfänge des testamentum per aes et libram," Zeitschrift für Vergleichende Rechtswissenschaft, XVII, 99.

rather than the institution of a universal successor.[50] But these matters of the antiquities of the law, while important, do not alter the essential correctness of Maine's conclusion that the modern will is a contribution of developed Roman legal thought.

The evolution of the informal legatary testament had scarcely been accomplished by Rome before the barbarians began their work of destruction. During the long period that elapsed from the fall of the Empire to the twelfth century, the only forms of post mortem transfer known to Europe were those already described, irrevocable donations with the reservation of life estates. Gradually, through the influence of the ecclesiastics, the post obit gift is transmuted into the fashion of the Roman testament, while the testament itself is liberalized in its form under the clergy's hands.[51] In Italy, because of the more complete Romanization of the peoples and the long continued association between the Lombards and the native population, the influence of the Roman testament is first visible.[52] Southern Germany received it rather earlier than Northern Germany. "Wherever the idea retained vitality of a right in expectancy in the heritage and the household property, or a general conservatism prevailed, as in Saxony, men struggled with a special obstinacy against such unilateral transactions, and clung tenaciously to the requirement of execution in court—as in the judicial practice of the Magdeburg Skevins of the 1200s and 1300s."[53] Southeastern France, notwithstanding its close association with Roman culture, until the twelfth century "a complétement ignoré le testament proprement dit, unilateral et revocable."[54] In England the will of personalty received recognition at a rather early date, possibly because of the close association of the Norman and Angevin monarchs with the clergy.[55] In general, it may be said that the unilateral, secret, revocable will had again become an institute of European law by the twelfth century. In form it still bears many of the imprints of its earliest character. Indeed we

50. *Lenel*, "Zur Geschichte der heredis institutio," "Essays in Legal History," Oxford, 1913, 120.

51. *Schultze*, Zeitschrift der Savigny Stiftung (Germ. Abt.), XXXV, 75, 102.

52. *Salvioli*, "Trattato del diritto italiano," 6th ed., 588, says that the revocable character of the will was established among the Lombards by the eighth century.

53. *Hübner*, 750.

54. *Caillemer*, "Les idées coutumières et la renaissance du droit romain dans le sud-est de la France," in "Essays in Legal History," 1913, 199. Cf. *Glasson*, Nouvelle Revue Historique, XVI, 773.

55. *Glanville*, VII, 6; *Pollock* and *Maitland*, II, 334-335; *Schultze*, Zeitschrift der Savigny Stiftung (Germ. Abt.), XXXV, 102.

are told that the wills found on papyri of the period of the first three Ptolemies bear a striking resemblance in phraseology to our modern wills.[56]

With the re-establishment of the conception of the will, its modern history begins. Once grasped, the conception is developed in the various lands of Europe under the influence of the most diverse social and economic forces. One of the most fundamental influences upon the medieval law of wills was that exercised by the distinction between movables and immovables, so essential in the feudal law, and even yet producing effects in our own legal system. The developed Roman will was unaffected by this difference, or by the distinction between ancestral property and personal acquisitions. But in the systems evolved by the peoples of Europe during the Middle Ages, the liberty of testation with which the Roman law was familiar suffered much curtailment by reason of these distinctions. The right of testamentary disposition over immovables was frequently denied, and most of the customs of the French law up to the date of the Revolution refused to admit the devise of ancestral lands.[57] In England it was not until 1815 that copyhold lands were devisable, and absolute unity in the testamentary law of the kingdom was not established until the passage of the Wills Act of 1837.[58] In Scotland, lands could not be devised prior to 1868.[59]

If we follow the varying fortunes of the last will and testament through one of the European systems, we cannot fail to observe how the institution has in part been consciously remodeled to suit the varying conditions of society, how in other respects it has been affected by external events which we can scarcely regard as other than accidental, but how upon the whole it has retained the original character imposed upon it by its origin. The familiar history of the will in England may well serve as an illustration. So early as the ninth century, we read how a man who died and then returned to life, divided his belongings into three parts, one of which he sold ("sealde") to his wife, one to his children, and the third, which fell ("gelamp") to himself, he divided among the

56. *Fry*, "Conveyancing under the Ptolemies," Law Quarterly Review, VIII, 56.

57. On the distinctions between movables and immovables, hereditary possessions and acquests, see *Brissaud*, 268-277; *Hübner*, 164-169.

58. 55 Geo. III, c. 192; 7 Wm. IV & 1 Vict., c. 26. Before the passage of this act there were ten ways in which a will might be made under different circumstances: Fourth Report, Real Property Commissioners, 12.

59. Title to Lands Consolidation Act, 1868, 31 & 32 Vict., c. 101.

poor.[60] This was evidently an example of the post obit gift of the Germanic law, and modern legal historians concede that the ambulatory will was unknown before the Conquest.[61] It was scarcely recognized and enforced by the ecclesiastical authorities before the king's courts are condemning not only the will of land but all post obit dispositions thereof. Because the last will was usually made in articulo mortis, because a decedent should make some provision for his soul by bequests to the poor and to the church, the jurisdiction over wills was naturally assumed by the clergy, and by the thirteenth century they had established that monopoly in ecclesiastical courts over wills of chattels which existed until the abolition of their jurisdiction in civil matters in 1856.[62] On the other hand, the royal authority drew to itself exclusive jurisdiction in all cases involving the title to land. As a consequence of the early division of jurisdiction and of the struggle between the lay and the ecclesiastical authorities, nowhere in Europe do we find the distinction between the succession to lands and to chattels more firmly marked than in England. Primogeniture becomes the rule of descent of lands, division between wife and children the rule of succession in the case of chattels; the church courts recognize and encourage the testament of chattels, the king's courts absolutely forbid the will of land, save where particular customs were of such force that they must be recognized.[64]

Rules of inheritance soon became universalized in a most singular fashion, especially under the influence of a specialized legal profession. Primogeniture, for example, is extended from the direct line, where the exigencies of military service may have served as an excuse for its existence in providing able-bodied soldiers, to collateral lines where the reason becomes less apparent. What excuse, again, can be given for the rule which remained in English law till 1833 that land may descend ad infinitum, but may in no case ascend?[65] It looks as if the mind, in evolving such a rule, were merely applying analogies from the laws of physics. Indeed, many of the doctrines of our property law would seem to rest upon the analogizing process of the legal mind. The very terminology

60. *Bede*, "Ecclesiastical History," cited by *Pollock & Maitland*, II, 314.
61. *Jenks*, "Short History," 61. This does not apply to privileged persons. Cf. Decree of Pope Alexander III, Nouvelle revue historique, XVI, 774.
62. *Pollock* and *Maitland*, II, 327.
63. *Pollock* and *Maitland*, II, 273; *Jenks*, 62.
64. *Pollock* and *Maitland*, II, 330.
65. *Bracton*, f. 62 b, uses the metaphor of the falling body to explain the rule about ascendants. On the doctrine of seisin "in nubibus," see *Fearne*, "Contingent Remainders," I, 359.

is replete with evidence of the process—the "reversion," the "resulting" use. Even to the present day our lawyers cannot embrace the notion of hereditas jacens, so familiar to the Roman law; they are obliged to hold that the heir becomes owner by reason of a mere physical fact, the death of the ancestor, without the privilege of refusing to accept an inheritance, however useless or even burdensome.[66] And this because the seisin "falls" to the heir. One of the most singular results of this universalizing process is the willingness of the law to recognize succession to the most remote of the blood of the decedent—a recognition which can be justified in modern law by no reasons of policy or justice.[67] The thought lying behind such a rule is that some one must be owner—there can be no vacuum in ownership. While the English law seems to have largely employed mathematical and physical illustrations in this field of law, medieval German legal thought used an anatomical image to picture the law of descent. The rules of succession were explained by a reference to the human body and its branches, and the right of succession was denied beyond the seventh degree, the nails of the hands and feet.[68] Bluntschli's argument that the state is a male person, while the church is female, may be placed beside this medieval example.[69] The employment of such analogies and of classifications drawn from such analogies is a fundamental process, whose effects have been important in legal as in other institutions.[70]

66. "An heir at law is the only person in whom the law of England vested property, whether he would or not. . . . No disclaimer that he might make would have any effect, though, of course, he might as soon as he pleased dispose of the property by an ordinary conveyance": *Williams*, "Real Property," 12th ed., 86.

67. Cf. *Joshua Williams'* view that the right of succession should be confined to immediate relatives: Law Quarterly Review, VII, 303. See also, *Ely*, "Property and Contract in Their Relation to the Distribution of Wealth," I, 427, 447.

68. *Hübner*, 716-719.

69. *Bluntschli*, "Theory of the State," translated by Ritchie and others, 32.

70. In a book that has come to the writer's notice since the above was written, occurs the following from the pen of Dean Wigmore: "My summary is then that no simple spiral will serve as an analogy; that no less complex an analogy than the planetary system will serve; that this analogy is a useful guide in our studies, because the gyroscopic inter-action of planetary forces reveals to us the inevitableness of similar inter-actions in the forces affecting laws; and that therefore we cannot expect to trace the evolution of a single legal institution without conceiving of it as a body in motion produced by a force, this motion modified by other immediate forces, and this body and its motions being one part only of a larger body which is itself in one or more motions produced by other forces and modifying the first motions; and this system as one part only of a larger system of forces and motions; and so on indefinitely": *Wigmore*, "Planetary Theory of the Law's Evolution," in *Kocourek* and *Wigmore*, "Formative Influences of Legal Development," 541, reprinted from Vir-

The settlement of the rule of male primogeniture and the denial of the power of testation over lands determined much of the future history of English law. The first principle became so firmly fixed that today England stands alone among European states in sanctioning this system, with the exception of pre-revolutionary Russia and Serbia.[71] Much as the principle has been criticized by English writers, it has not been without defenders. McCulloch supported it on the ground that it tended to preserve for agriculture the benefits of the system of large industry; Dr. Johnson whimsically suggested that it served to make but one fool in a family instead of several.[72] The denial of the power of testation over land lasted long. True, the device of feoffments to uses, beginning with the twelfth century, enabled land owners to deal very freely with their lands, even extending to post mortem dispositions. But it was not until 1540 that recognition was given to the will of lands, directly, though certain local customs had always preserved the institution.[73] The abolition of uses in 1536, involving the destruction of the power of testation over land, was urged by the rebels of the north as one of their grievances against Henry VIII.[74] The king was doubtless quite willing to concede the right to devise lands. He had just disposed of the Crown by will and inasmuch as it was then an established doctrine that the Crown devolved under the principles of the common law governing the inheritance of lands, must have been anxious to permit to his subjects the privilege which he had exercised. Moreover, as Mr. Holdsworth has pointed out, there is evidence that he contemplated a revision of the land law of England to make it more harmonious with the ideas of the new learning and with the needs of advancing civilization.[75] Perhaps also the royal draftsmen had it in mind that the power of testation given by the Statute of Wills in such an unlimited way might serve to prevent the too extensive operation of the principle of primogeniture. The dictates of natural affec-

ginia Law Review, IV, 297 et seq. See, also, in the same volume, *Picard*, "The Perpetual Evolution of Law," 670 et seq., translated from "Le droit pur."

71. *Maitland*, "The Law of Real Property," "Collected Papers," I, 173.

72. *McCulloch*, "Succession," passim.

73. 32 Hen. VIII, c. 1. As to the customs, see *Pollock* and *Maitland*, II, 330; *Holdsworth*, III, 66, 236; *Bateson*, "Borough Customs" (Selden Society), p. XCII; *Gross*, "The Medieval Law of Intestacy," Harvard Law Review, XVIII, 120.

74. *Digby*, "History of the Law of Real Property," 5th ed., 346, note 1.

75. *Holdsworth*, "The Political Causes Which Shaped the Statute of Uses," Harvard Law Review, XXVI, 108; *Holdsworth*, "History of English Law," II, 501.

tion, it might well be supposed, would operate to induce testators to divide their lands among their children, and thus prevent the concentration of property and the establishment of an over-powerful aristocracy.[76] For whatever reasons, the utmost freedom was given by the new statute to testators with respect to all lands held in socage tenure and two-thirds of all lands held by knight service. The subsequent abolition of knight service in 1660 made devisable all freehold lands held in estates of inheritance, other than estates tail.[77] Copyhold lands were made devisable in 1815.[78] Until 1837, however, the will of land retained traces of the post obit gift. It operated only upon lands owned at the time of its execution. The Victorian Wills Act for the first time brought the English will of land nearer to the Roman codicil by making it operate on all lands which the testator owned at the time of his death.[79]

So far as concerns form, the history of the English will has been a development from comparative formlessness to a more strict degree of ceremony—in this respect reversing the history of continental law.[80] The statute of Henry VIII did not restrict the new power by requirements of form. The testator was given "full and free liberty" to devise "by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life." At common law a parol will of land was good in the case of lands devisable by custom, and the ecclesiastical courts did not require writing for testaments. Whilst the statutory will was not quite so informal, it required no signature, not even writing by the testator; it was sufficient that a third person write the will.[81] When under the decision in *Bushell's* case in 1670 the jury ceased to be liable to fine and punishment for its erroneous decisions it must have become apparent that the title to the lands of the kingdom depended upon the whim of that popular tribunal.[82] An extreme case in 1667 possibly opened the way for the Statute of Frauds of 1677,

76. The preamble of the Statute of Wills recites as one of the evils to be remedied the fact that Henry's "loving subjects" could not because of the absence of the will of land "conveniently keep and maintain their hospitalities and families, nor the good education and bringing up of their lawful generations, which in this realm (laud be to God) is in all parts very great and abundant." Another reason assigned is "to advance their children and posterities": Statute of Wills, 32 Hen. VIII, c. 1.

77. 12 Car. II. c. 14.

78. 55 Geo. III, c. 192, s. 1.

79. Fourth Report Real Property Commissioners (1833), 12.

80. On the history of the form of wills in English law, see *Thayer*, "Preliminary Treatise on the Law of Evidence," 414; *Digby*, 379.

81. *Brown* v. *Sackville* (1552). Dyer, 72.

82. *Thayer*, 430; *Costigan*, "Date and Authorship of the Statute of Frauds." Harvard Law Review, XXVI, 343: *Baynham's* case (1667), Siderfin, 128; *Bushell's* case (1670), Vaughan, 135; 29 Car. II, c. 3.

which first required signature and witnesses for the validity of all wills of land.[83] The statute of Victoria in 1837 added other requirements designed to protect against fraud, and placed wills of personalty with respect to form on the same footing with those of realty.[84] Uniformity was also secured in the manner of making a will—before this statute there had been ten methods.[85] If this, an increasing rigidity of form in the case of testamentary acts, seem to be a strange development, it is by no means a unique example in modern law—the requirement of the seal in the case of leases first demanded in England in 1845, uniform bills of lading and warehouse receipts, standard fire insurance policies, are a few other modern examples.[86] As Dean Pound points out, "the statute of frauds imposes a modern form for modern reasons, namely, to protect the social interest in security of transactions and security of acquisitions. Forms must still play an important part where the law is seeking to protect those interests."[87]

One of the most interesting features in the development of English testamentary law was the fate of the "légitime" or reserve. The law of the thirteenth century recognized this institution, and permitted the testator to bequeath only a part of his movables, one-third if he left a wife and children.[88] Until 1692 this system continued to prevail in the northern province of York, as it still does in Scotland. It was abolished by statute, so far as it prevailed in the province of York, in the last named year; it had long before ceased to exist in the province of Canterbury. It lasted in Wales until 1696, and in the City of London until 1724.[89] By the statutes just referred to, the principle of absolute liberty of testation became a universal principle in English law.

The codes of continental Europe, in their adoption of the rule of equal division in case of intestacy and in the matter of the reserve or légitime, present the greatest contrast to the English system. In all the principal ones, restrictions more or less extensive in favor of the family of the testator exist upon his unlimited power

83. *Powell*, "Devises," 3rd ed., *27*.
84. 7 Wm. IV and 1 Vict., c. *26*.
85. Fourth Report Real Property Commissioners, 12.
86. 8 & 9 Vict., c. 106; *Vance*, "Insurance," c. XII; *Isaacs*, "Standardizing of Contracts," Yale Law Journal, XXVII, 34, 38.
87. *Pound*, "The End of Law," Harvard Law Review, XXVII, 210.
88. *Pollock* and *Maitland*, II, 348, 350; *Holdsworth*, III, 434.
89. 4 & 5 Wm. & Mary, c. 2; 7 & 8 Wm. III, c. 38; 11 Geo. I, c. 18. These statutes, while they abolished the légitime in England, did not change the local rules respecting the distribution of chattels in cases of intestate succession. It is a curious fact that absolute uniformity in the latter respect was not obtained until 1856: *Holdsworth*, III, 436.

of will-making.[90] Thus, under the French Civil Code, the testator may bequeath only one-half of his property if he leave but one child, one-third if he leaves two, one-fourth if he leaves three, and so on—the denominator of the disposable fraction being one more than the number of children. A légitime is also provided for the benefit of ascendants, but not in favor of collaterals—none is secured to the surviving spouse, whose rights are otherwise secured by the matrimonial régime. French law treats the légitime as a property right, not as a mere claim or debt.[91] The German Civil Code, on the other hand, treats the reserve ("Pflichtteil") as a personal claim against the heirs; a person entitled to a compulsory portion has no direct interest in the estate, but only a money claim against those who succeed to the decedent's estate under the will. Moreover, the portion reserved from testamentary disposition under the German law is one-half of what the person in whose favor it exists would have received in case of intestacy. Finally, only the descendants, the father, the mother and the surviving spouse, are entitled to the Pflichtteil.[92] The German code has departed from the principles of the French code and of prior German legislation in permitting a wider power to the testator. This it has done by altering both the character and the amount of the compulsory portion. The Japanese code treats the compulsory portion in much the same way as the German.[93] The Swiss Civil Code, which went into effect in 1912, though it has been described as a revised edition of the German code, returns in this matter to the French theory of the légitime as a property right and not a mere personal right. It adopts, however, the German plan of making the compulsory statutory share a quota of what would have been received by succession ab intestato—in the case of parents one-half, in the case of brothers and sisters one-quarter, in the case of a surviving spouse the whole, if legal heirs survive, or one-half, if such spouse be the sole legal heir. The cantons are authorized to abolish the Pflichtteil of brothers and sisters or to extend it to the issue of such brothers

90. *Lehr*, "Des successions testamentaires d'après les principaux codes de l'Europe," Revue de droit international, XXXVIII, 144.

91. French Civil Code (Annotated), translated by E. Blackwood Wright, §§ 913-919; *Planiol*, "Traité Élemèntaire de Droit Civil," 6th ed., III, 789.

92. German Civil Code, §§ 2303-2330; *Dernburg*, "Bürgerliches Recht," V, 298; *Lehr*, Revue de droit international, XXXVIII, 153; *Schuster*, "Principles of German Civil Law," 626.

93. Civil Code of Japan, translated and annotated by De Becker, IV, 149.

and sisters.[94] The extension of the légitime in favor of collaterals has received criticism upon the ground that it extends family rights beyond the interests necessary to support the family.[95]

Concerning the policy of the reserve has arisen in France a storm of controversy, such as in our own more phlegmatic country or in England has never developed around principles of private law.[96] No sections of the Civil Code have been more discussed than those dealing with the law of succession. These sections have been termed "la véritable constitution des Français." On the other hand, when Castlereagh said in 1815, "It is unnecessary to destroy France, the Civil Code will take care of that," he had in mind the forced equality in successions, the central feature of the policy of that code in respect to post mortem and gratuitous transfers.[97] M. Le Play, an ultra-conservative in politics and religion, finds in the system of enforced partition thè destruction of the family, of morality, religion, and industry, the cause of the declining birth rate, of the increase in crime, of stock gambling and fraudulent promotions of financial enterprises, indeed, all the evils of modern society. His remedy is the adoption by France of the system of free testation as it exists in England and the United States.[98] Others, from a more radical standpoint, criticize the articles of the Code as typical of the influence of the propertied classes in its formation.[99] The enforced principle of equality has, it is argued,

94. Swiss Civil Code, translated by Shick, §§ 470 et seq; Rivier, Les successions à cause de mort en Suisse, Revue de droit international, IX, 239; Lehr, id. XXXVIII, 150.

95. *Gaudemet*, "The German and Swiss Codes Compared with the French Code," "Progress of Continental Law in the 19th Century" (Continental Legal History Series), 305; *Lehr*, Revue de droit international, XXXVIII, 160.

96. An extensive literature upon this subject exists in France. The books of *Le Play*, "La réforme sociale," of *Boissonnade*, "Histoire de la réserve héréditaire," and of *Brôcher*, "Étude sur la légitime et les réserves," are among the most important. The Société d'économie sociale, stimulated by Le Play's writings, undertook an "Enquête sur l'état des familles et l'application des lois de successions." Brief accounts of the literature may be found in Planiol, III, 789; *Bruns*, Zeitschrift für Vergleichende Rechtswissenschaft, II, 190; *Colin*, "Le droit de succession dans le code civil," in "Le code civil, Livre du Centenaire," I, 297.

97. *Colin*, I, 297.

98. While Le Play advocated unlimited testamentary power as a cure for the evils he found in enforced partition, M. de Cornulier Lucinière, whose political and social creed is similar to that of Le Play, argues for the entire abolition of the will: *Planiol*, III, 390, note 1.

99. On the actual operation of the system in the case of the small land owner, see *Charmont*, "Changes of Principle in the Field of Family, Inheritance, and Persons," translated from "Les Transformations du droit civil" in "Progress of Continental Law in the 19th Century" (Continental Legal History Series), 158. As to the disastrous effects in the Basque provinces, see *Viollet*, "Histoire du droit civil français," 878.

caused too minute subdivision of the land, has reduced the peasantry to poverty, has chained man to the soil. Napoleon himself suggested that the system was more suitable to the great fortune than to small properties where the subdivision tends to make society stationary.[100] The defenders of the French successorial régime have usually conceded that in some respects it should be changed, possibly so as not to apply to very small holdings, and in general to allow a somewhat greater proportion to the "quotité disponible."[101] Meanwhile with the conservatism characteristic of private law, and more particularly of that part of it which deals with succession, the legislation of 1804 remains practically unchanged in 1918. As a rule, continental jurists express themselves in favor of the policy of the reserve.

The satisfaction with the fundamental principles of their law of succession which has been expressed by European writers has not usually been imitated by the English in their comments on their own system. Blackstone, for example, a rather consistent eulogist of the English civil law, permits a doubt as to the propriety of "a power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor from those of his blood to utter strangers."[102] Criticisms of primogeniture have been very numerous, from the time of Bentham to that of Maitland.[103] So conservative a lawyer as Joshua Williams thought that the whole existing law of inheritance of land should be swept away, and that when a man died intestate his lands should be sold and the proceeds divided among his wife and children.[104] Yet the rule favoring the eldest male survives, with other strange rules of property law, tending to make the English law on

100. *Colin*, "Le code civil," I, 318. Napoleon suggested that the reserve should not exceed one-half in the case of fortunes of less than 100,000 francs.

101. *Colin*, "Le code civil," I, 315.

102. *Blackstone*, II, 373.

103. *Bentham*, "Works," V, 387; *Maitland*, "Collected Papers," I, 171; *Boissonnade*, "Histoire de la réserve héréditaire," 607.

104. *Williams*, "The Seisin of the Freehold," 97. Cf. with Grotius' views, note 5 supra, the following from this valuable book. "It seems to me that when a man has the misfortune to die intestate, the law should, so far as it can, do for him what it might be supposed he would himself have done, had he made a will. This, of course, can only be done approximately; but it seems to me that the best approximation would be to vest his landed property in a real representative, in trust to sell it, and to distribute the proceeds of the same amongst his next of kin, in the same manner as, with regard to personal estate, the executor or administrator of the effects of the deceased sells the same and distributes the proceeds according to the statute of distribution."

this subject, to use the expression of a French writer, "a veritable museum of antiquities."[105]

The rigor of the English system of inheritance is modified, however, not only by the existence of the free power of testation, but also by the elaborate scheme of family settlements, which custom has imposed upon the great landowners of the kingdom.[106] The system of family settlements is thus described by Sir Frederick Pollock:

"The lord of this mansion is named by all men its owner; it is said to belong to him: the park, the demesne, the farms, are called his. But we shall be almost safe in assuming that he is not the full and free owner of any part of it. He is a 'limited owner,' having an interest only for his own life. He might have become the full owner, though still under a greater or less burden of encumbrances created by his predecessors, if he had possessed the means of waiting, the independence of thought and will to break with the tradition of his order and the bias of his education, and the energy to persevere in his dissent against the counsel and feelings of his family. But he has had every inducement to let things go their accustomed way. Those whom he had always trusted told him and probably with sincere belief, that the accustomed way was the best for the family, for the land, for the tenants, and for the country. And there could be no doubt that it was for the time the most agreeable to himself. As soon, or almost as soon, as he was of age to bind himself, he entered into a new settlement, by which his own interest was reduced, like his father's before him, to that of a life-tenancy, and the succession of his offspring secured in advance down to the furthest limits allowed by the law. . . . Thus, then, the apparent owner of the domain is no more absolute as to its actual disposition and management than the king is absolute in a limited monarchy. He can do but little of his own motion, and what he does is for the benefit of successors not of his own choice."[107]

The will is used extensively in England as a supplement to the settlement, and as one of the means used to carry out its terms through the familiar power of appointment. But its most important use is in disposing of property not covered by settlement, especially that acquired in trade or business. The sentiments surrounding the two sorts of property have perhaps caused as wide a separation between the actual course of succession of the two as existed under

105. *Brissaud,* Review of Pollock and Maitland's History of English Law, Nouvelle revue historique, XXI, 828.

106. *Blackstone,* II, 374, points out that the system of freedom of testation is a necessary corrective of the principle of primogeniture, tending to correct what would otherwise constitute a menace, the accumulation of very large fortunes.

107. *Pollock,* "The Land Laws," 8, 9.

the Russian legislation between patrimonial estates and others. Whatever the reason may be, it is a fact that intestacy is the exception in England. The contrary is the case in France, where the slight margin allowed to the individual's volition and the harmony of the law of succession with the natural instinct of owners has fostered the habit of intestacy even with respect to the "quotité disponible."[108] Influences of legal institutions upon national character may easily be exaggerated, but it is possible that to a certain degree the attitude of the individual in America and England toward the state and society, and his belief that his belongings should be subject to his volition alone, have been fostered by the concession of free testamentary power.[109] Unfortunately statistical or other material for the objective study of such questions hardly exists. The most casual observer must however have noted the difference in the sense of property between the self-made millionaire and the heir of an ancient house.[110]

The danger exists in respect to the study of the merely "literary theory" of a legal institution that too much emphasis may be placed upon externals. Much of the controversy regarding this particular matter—especially among the French writers of a generation since—seems to be permeated with the fallacy of attributing too much to the letter of code and statute, and of viewing the will as an institute abstracted from the other institutes of the law. Even Maitland seems to fall into this error in criticizing the English law of inheritance.[111] Such an institution as the English will cannot be viewed alone, nor merely in connection with the law of intestacy. The family settlement, as has just been pointed out, is almost, if not quite, as important as the will itself in providing for the disposition of property at death. And with the growth of succession, inheritance and transfer taxes, it is probable that owners are resorting to inter vivos transfers with increasing frequency for the purpose, if possible, of escaping these burdens. The trust has so deeply affected the law of property in our system, that notwith-

108. As to England, see *Pollock*, "The Land Laws," 175; *Williams*, "The Seisin of the Freehold," 97. As to France, M. *Charmont* says ("Progress of Continental Law in the 19th Century," 164): "The disposable portion is no longer taken advantage of today. The idea of equality has so entered into our customs that the father would not exercise the powers given him."

109. *Troplong* says "la liberté du testament est plus grande preuve de la liberté civile" "Traité des donations entre vifs et des testaments," Preface.

110. Cf. *Von Jhering*, "The Struggle for Law," translated by Lalor, with introduction by Kocourek, 2d ed., 50.

111. *Maitland*, "Collected Papers," I, 162.

standing Maine's boast concerning the will as a keystone of existing society, the abolition of the formal will might conceivably leave our actual law of post mortem disposition but slightly changed in its actual operation. A conveyance to a trustee reserving to the grantor a life estate, legal or equitable, together with a power of revocation, is at present scarcely distinguishable in its operation from a will and answers most of its purposes.[112] Even were such arrangements positively forbidden by legislative declaration, the substance of testamentary institutions might well survive in the form in which they existed before uses were enforced by the chancellor, resting upon an honorary sanction rather than a legal one. The use was almost as well enforced before John of Waltham issued the subpoena as afterwards.[113] The feoffment to joint tenants adapted a purely legal institution, that of collective ownership, to fortify the honorary obligation. If one trustee might prove faithless, five would scarcely do so, and the principle of survivorship excluded the possibility of an interloper by reason of the succession of a stranger.[114] In modern times, the business corporation which adds so immensely to the fluidity of wealth by the easy process of converting immovables into equivalent shares of stock, the perfection of instruments of credit, make for greater ease in transfers, render possible greater secrecy, and thus affect the problems involved in the study of inheritance and testation.[115] Life insurance is another modern institution which cannot be overlooked in connection with the will idea. Even a French owner, notwithstanding the reserve with its outworks in the law prohibiting gratuitous donations, may, if sufficiently desirous of disinheriting his heir, convert his belongings into life annuities and achieve his purpose by this indirect means.[116]

Matters of a different kind from those just named have also affected the operation of the extreme liberty of testation allowed in our system. Social opinion has usually prevented testators from employing a too arbitrary exercise of their power, and where that has failed the verdicts of juries have had some effect in the same

112. Note, "Non-Testamentary Conveyances to Take Effect After Death," Harvard Law Review, XXX, 508.

113. *Campbell*, "Lives of the Chancellors," I, 296, note; *Blackstone*, III, 52.

114. *Maitland*, "Equity," 26.

115. *Moulton*, "Commercial Banking and Capital Formation," Journal of Political Economy, XXVI, 484, 638, 705.

116. *Planiol*, III, 790: "J'en ai vu des examples absolument scandaleux." See, also, *Thaller*, "La jurisprudence de l'assurance sur la vie et la quotité disponible."

direction. The dominant position of the legal profession has had its effect, too, in standardizing within certain limits the character of testamentary dispositions and in checking violence and injustice on the part of clients. When his friend Langton made a will, Dr. Johnson said to his solicitor, "He believes he has made this will; but he did not make it; you, Chambers, made it for him. I trust you have had more conscience than to make him say 'being of sound understanding.' "[117] These influences, among countless others, have brought it about that in England, the home of primogeniture and absolute power of testation, most testators throw all their property, including land, into a common stock for equal division among their children.[118] The difference between actual practice as to succession in England and in France is therefore by no means so wide as an exclusive reliance upon the texts of legal rules would lead one to suppose. Divergence between form and reality in this respect is an illustration of what Professor Ehrlich has said:

"We lawyers are always inclined to assume that our rule of decision is a faithful expression of how things are actually done—that a rule of law is also a rule of life as it is. But in reality these may be two very different things. In reality life creates primarily its own rules. How small is the influence of the law of family, as formulated in rules, on the actual conduct of family life; how different the interpretation and execution of contracts in actual business from the interpretation by the courts in the few cases in which a decision passes upon them."[119]

The English law of succession has undergone considerable modification in its new habitat in America. The distinction between the order of succession in real and personal property and the rule of primogeniture became the law of some of the colonies, but by the end of the revolutionary period, these peculiarities of the English system had been abolished in all the American colonies. The New England people had never recognized from the beginning the English rule of descent.[120] Indeed, the modification of this rule seems to have been one of the tenets of the extremer sects of the Puritan

117. *Boswell,* "Life of Johnson" (Harper ed), I, 321.

118. *Pollock,* "The Land Laws," 176. On the peculiar position of the conveyancer in English practice, see *Pollock,* "A First Book of Jurisprudence," 307.

119. *Ehrlich,* "Judicial Freedom of Decision: Its Principles and Objects," translated by Bruncken from " Freie Rechtsfindung and freie Rechtswissenschaft," in "Science of Legal Method: Select Essays" (Modern Legal Philosophy Series) 80.

120. *Kent,* "Commentaries," 14th ed., by Holmes, IV, 375, note d; "Two Centuries Growth of American Law," 186; *Colin,* "Le Code Civil," I, 304; *Hildreth,* "History of the United States," III, 387.

movement in the home land. Thus, in the report of the committee of "Barebones" parliament upon reform in the law, "one of the most remarkable documents in English legal history," an attempt had been made to change the law of descent.[121] Though the report failed of adoption, the ideas embodied in it found some expression in the New England colonies. Massachusetts, at least as early as 1655, adopted the same rules of succession for real as for personal property, and did away with the principle of primogeniture, awarding to the eldest son in its stead a double portion, "according to the law of nature and the dignity of birthright." Connecticut, Delaware, and Pennsylvania adopted the same rule. By the close of the eighteenth century the rules of succession to personalty had become universal. The impartibility of land on the death of its owner and the preference for the male stock, which Maitland characterized as a remnant of primitive law, were thus abandoned.[122] The influence of the American system of inheritance upon the French legislators of the revolutionary era, especially through the contact of Jefferson, minister at Paris from 1785 to 1789, who perhaps more than any one man had contributed to the overthrow of the older system in Virginia, was doubtless considerable. A dominating effect has, indeed, been claimed for Jefferson upon the entire legislation of the Constituent Assembly.[123]

The other leading principle of the England law of succession, liberty of testation, continues to exist, though with a tendency to limit it in some respects. In some of the Southern colonies there was, indeed, in the late seventeenth and early eighteenth centuries a slight movement in the direction of greater immobility with respect to landed property than existed in the mother country, as, for example, in the denial of the judicial power over fines and recoveries in the colony of Virginia.[124] But any such movement was positively arrested by the Revolution. More characteristic of the prevailing American temper, even in colonial times, was legislation protecting the children of a testator. The Massachusetts statute of 1700, which provided that posthumous children, children born after the date of a will, and children omitted in the will of their father, unless expressly disinherited or otherwise provided for, should

121. *Jenks,* "Short History of English Law," 178; *Somers,* "Tracts," VI, 177; *Robinson,* "Anticipations under the Commonwealth of Changes in the Law," Juridical Society's Papers, III, 567.

122. *Kent,* IV, 375.

123. *Meyer,* "Heimstätten-und andre Wirthschaftsgesetze," 318.

124. *Hildreth,* II, 240; *Colin,* "Le Code Civil," I, 305.

succeed as upon intestacy, was imitated in other colonies.[125] Most of the states of the Union have followed the principles of this early statute of Massachusetts. England, however, has not legislated to this effect, and the proverbial "cutting off with a shilling" has no legal significance, though possibly reminiscent of the day when the Roman law respecting inofficious testaments was influential in the ecclesiastical courts.[126] Another type of statute similar to the Massachusetts law referred to is that providing against the lapsing of legacies and devises because of the predecease of the legatee or devisee, in case the latter leave children or descendants.[127] By statutes of this sort it is true that the testator's power to change his will is not affected. But the adoption of such rules, by raising presumptions in favor of children and descendants, has somewhat qualified the operation of the extreme principle of liberty of testation—rules of law have taken the place of expressions of the testator's volition.

In this connection should be mentioned the doctrine of implied revocation by change of circumstances, a bold piece of judicial legislation.[128] One of the early cases in chancery, in which this matter was discussed, refers to Cicero and the Digest "de haeredis institutione," and it is very evident that the "querela testamenti inofficiosi" was consciously before the judges who first evolved the doctrine that marriage followed by birth of issue raised a presumption of revocation, where no provision was made for the wife and issue.[129] In accordance with the prevailing spirit of the English law, what was at first a matter of presumption became a fixed rule.[130]

A surprising circumstance in the development of the rule was that the common law courts adopted the principle, though it was expressly provided in the Statute of Frauds that no will should be revoked, save by certain formal acts. It is true, as Professor Costigan points out, that the court of chancery, because of the authorship of the statute did not consider itself bound by the statute, but for the most part the common law courts followed it strictly,

125. "Two Centuries' Growth of American Law," 187, note 2.

126. The American statutes are cited in *Warren*, "Cases on Wills and Administration," 284, note 1. For an explanation of the "cutting off with a shilling," see *In re Newlin's Estate*, 209 Penn. 456, 58 Atl. Rep. 846; *Blackstone*, II, 502.

127. *Warren*, 329, note 4.

128. *Jarman*, "Wills," 6th Eng. ed., 140; *Page*, "Wills," § 281; *Underhill*, "Wills," § 238.

129. *Eyre* v. *Eyre*, cited in *Cook* v. *Oakley*, 1 P. Wms. 302.

130. As to wills of land, see *Christopher* v. *Christopher*, Dick. 445.

save in this instance.[131] The precise limits of the rule were not fixed until the third decade of the nineteenth century, and by that time the rule itself, extended so as to make marriage alone operate as a revocation, had become a part of the Statute of Wills.[132] The Victorian statute, which gave this extension to the rule, expressly prohibits the judges from extending the doctrine of revocation by change of circumstances.[133]

The tendency exhibited in the legislation, statutory and judicial, which has just been mentioned, evidences a strong predisposition to favor the widow and children, but without forbidding testators to devise their belongings as they chose. But with the development of the democratic movement in the United States during the first half of the nineteenth century, novel principles began to operate. The policy of exempting from forced sale a minimum of the debtor's property was early recognized by the states of the Union.[134] At first this was confined to the barest requirements, wearing apparel, household furniture, the tools of a mechanic. Later, a house and a small quantity of land, constituting the homestead of the debtor, were added to the exemptions.[135] More recent legislation has extended the amount and character of the exemptions.[136] It is but a step from the policy of exempting property from creditor's claims during the debtor's lifetime to that of giving such property upon decedent's death to his family free from such claims. Frequently, therefore, American statutes provide that the property of the decedent, exempt from execution, including the homestead, shall be set apart, free from the claims of creditors, to the widow and minor children. Usually such property is also removed from the scope of the testamentary power.[137] The extent and quantity of the estate or interest vesting in the widow or minor children varies. Sometimes it is a fee simple estate, or an absolute interest; sometimes a life estate; sometimes a mere right of occupancy. But whatever its extent, it is manifest that a considerable limitation has been made upon the unrestricted right to leave property by will. In fact, a qualified or limited légitime is provided

131. *Costigan*, Harvard Law Review, XXVI, 343.
132. *Marston* v. *Roe dem. Fox*, 8 A. & E. 14; 7 Wm. IV & 1 Vict., c. 26, sec. XVIII.
133. 7 Wm. IV and 1 Vict., c. 26, sec. XIX.
134. See the early history of such statutes in *Bank* v. *Green*, 78 N. C. 247, 255.
135. *Warren*, "History of the American Bar," 468; *Dillon*, "Laws and Jurisprudence of England and America," 360.
136. See, e. g., Code Civil Procedure, California, § 690.
137. *Woerner*, "The American Law of Administration, I, 101.

for the family, though based upon principles remote from those that governed the French legislation of the early nineteenth century. While the provisions of the French code rest upon the notion of the abstract right to equality on the part of a decedent's children, the American legislation under review rests upon principles of social interest. The evils suffered by society through the pauperization of individuals outweigh the benefits accruing from the strict payment of his debts by a debtor. From another standpoint, these laws are a clear expression of the growing sense of the value of human personality. It must be admitted that the spirit of these laws is frequently better than their expression, and that the crudity of the legislative workmanship often leads to results not contemplated.[138] In spite, however, of its abuses, the essential thought of this legislation, which has imposed a considerable limitation upon the volition of the individual owner, is in harmony with the socialized conception of law that is so rapidly supplanting individualistic theories.

From another angle, great inroads have in recent times been made upon the entire matter of succession, especially testamentary succession, through the imposition of inheritance taxes, death duties, and similar imposts and taxes. Though this manner of raising revenue was familiar to the Roman emperors and though the reliefs and primer seisins of the feudal system were essentially of this character, it fell into abeyance with the downfall of the feudal system. It was not until 1780 that Lord North, influenced it has been said by Adam Smith's "Wealth of Nations," introduced a stamp tax upon receipts for legacies or shares of personal property, and it was not until 1853 that real property in England was affected by this sort of tax.[139] The common employment of inheritance or succession taxes in the United States may be said to have begun with the adoption of the system by New York in 1885, though both state and federal inheritance taxes had been employed to some extent before that date. The New York law, as amended in 1891, served as a model for legislation elsewhere, and the taxation in some form of inheritances or legacies of successions is now practically universal throughout the United States.[140] The tax is nearly always a graduated or progressive one. Often the amount is so large in the case of great fortunes as to constitute, in effect, a limitation

138. *Estate of Levy*, 141 Cal. 646; *Estate of Klemp*, 119 Cal. 42; *Estate of Brown*, 123 Cal. 399.

139. *Dos Passos*, "Inheritance Tax Laws," § 4.

140. Statutes, New York, 1891, c. 215.

upon the quantity of property that can pass to the more distant relatives by intestate laws or to such relatives or strangers in blood by will. An extreme instance is afforded by the law of Oklahoma which imposes a tax of 100 per cent upon intestate successions to more remote collateral kindred and upon devises or bequests to such collaterals or strangers in blood, in cases where the value of the property passing exceeds $100,000.[141] Manifestly this law is in fact a limitation upon the amount that can be left to strangers or distant relatives by will. Liberal exemptions are usually granted under these statutes to the wife and children. It is also of interest to notice that the policy of the mortmain acts is often reversed by the succession tax legislation, and testators are encouraged to leave their property by will to benevolent and educational purposes, for devises and bequests to such uses are frequently, if not usually, made free from the taxes. Thus, under the Oklahoma law just referred to, though a testator is forbidden to leave more than $100,000 to a friend, and is discouraged by a heavy tax from leaving him less, there is no limit to the amount that can be left for educational purposes, which are wholly free from the tax.[142]

The methods by which the eighteenth century concept of the testator's rights and privileges has been modified is characteristic of our legal history. One man or a group of men criticizing anomalies or absurdities is like a voice in the wilderness. So conservative a suggestion as that urged by Joshua Williams that the property of decedents dying intestate and leaving no immediate relatives should go to the state rather than to distant relatives receives no attention. And though the state is annually spending large sums for education and benevolent work, it permits statutes to remain on the books, an inheritance from the past, which forbid the power to devise land or to bequeath personalty for charitable or educational uses.[143] The growing demands of the state, ever demanding new sources of revenue, gradually, however, diminish the number and importance of such anomalies, and without purporting to deal with testamentary institutions profoundly change their character. Succession of distant relatives is not forbidden, the abstract right or privilege to leave property by will is not denied, but public opinion translating itself into legislation discourages bequests to strangers, arrests the course of descent to remote kin by severe

141. Revised Laws, Oklahoma, 1912, §§ 7492-7493.

142. Id., § 7494.

143. *Sir Frederick Pollock*, note, Law Quarterly Review, VII, 303; also, id., VII, 9. See, also, *Bristowe*, "The Legal Restrictions on Gifts to Charity," Law Quarterly Review, VII, 262.

taxation, fosters the socialization of private property by exempting from such taxes legacies for public purposes. The principle of forced partition at death is not imposed upon fathers as in France, nor on the other hand is reliance for the protection of the family left almost entirely to the operation of the natural instincts and the weight of social opinion as in England, but the more helpless portion of the community is protected by such institutions as the homestead. And thus by various devices liberty of testation is limited, although the law of inheritance and the law of wills remain in form unchanged.

ADVERSE POSSESSION AGAINST REVERSIONERS AND REMAINDERMEN

By Albert M. Kales[1]

I

Where One Enters under a Conveyance from the Life Tenant

Where one enters under a conveyance purporting to transfer the life estate only: If the conveyance by the life tenant purports to convey only the life estate, there is of course no adverse possession against any one, much less against the remainderman,[2] prior to the death of the original life tenant.[3] Even upon the death of the life tenant the inference might well be that the holding over was in conscious subordination to the true owner and therefore not adverse until some act or expression of intention indicated the contrary and that possession as of right was claimed.[4]

Where one enters under a conveyance by the life tenant purporting to transfer the fee: If the conveyance is tortious—by fine, feoffment or recovery—a ground of forfeiture arises by operation

1. [Born at Chicago, March 11, 1875; A. B., 1896, LL. B., 1899, Harvard University; assistant professor of law, 1902-10, professor of law, 1910-16, Northwestern University; 1916-17, professor of law at Harvard University; author of "Conditional and Future Interests and Illegal Conditions and Restraints in Illinois" (Chicago, 1905), "Cases on Persons and Domestic Relations" (St. Paul, 1911), "Unpopular Government in the United States" (Chicago, 1914), "Cases on Contracts and Combinations in Restraint of Trade" (2 vols., Chicago, 1916), "Cases on Future Interests and Illegal Conditions and Restraints" (St. Paul, 1917), and of numerous articles chiefly in the field of land law in the leading American and English law reviews.

Mr. Kales is widely known as an authority on questions of future interests in land and on the construction of wills, both as a teacher and legal practitioner. He is one of the few of the later generation who have been able to unite successfully the duties of the classroom with an active practice in the courts. Mr. Kales has also taken a keen interest in an efficient reorganization of the courts. As one of the directors of the American Judicature Society, he has drafted several proposals for unified court organization. A large part of Mr. Kales' academic writing is found in the first twelve volumes of the Illinois Law Review.—Ed.]

2. For the sake of simplicity, whenever vested remainders are referred to, reversions are also included.

3. See *Rohn* v. *Harris*, 139 Ill. 525; *Blair* v. *Johnson*, 215 Ill. 552; *Meacham* v. *Bunting*, 156 Ill. 586, 594 (Possession of original life tenant not adverse).

4. See *Bond* v. *O'Gara*, 177 Mass. 139, where a licensee in possession after the termination of the license by the conveyance of the land by the licensor continued in possession and it was held that possession was still in conscious subordination to the right of the owner and not adverse.

of law; but under *Taylor* v. *Horde*[5] no forfeiture of the life estate actually occurs until the one entitled to enter elects to declare it in some appropriate manner. Until, therefore, the forfeiture is complete, the possession of the one entering under the tortious conveyance is not adverse to the remainderman.[6] The moment, however, that the original life tenant dies, the possession of the tortious transferee becomes adverse to the remainderman.[7] Possession under a tortious conveyance rebuts any inference that the possessor was holding over in conscious subordination to the remainderman.

Now suppose the life tenant has conveyed in fee by deed, or by bargain and sale, so that the conveyance has no tortious operation. Such a conveyance transfers only what the grantor has—namely, the life estate. It has been intimated that such a conveyance might be a cause of forfeiture.[8] If, however, there is no forfeiture of the life estate, the grantee of the life tenant becomes the holder of a life estate "pur autre vie" and his possession cannot be adverse to the remainderman during the life of the original life tenant.[9] One English case at least has gone so far as to determine

5. 1 Burr. 60.

6. *Jackson* v. *Mancius*, 2 Wend. (N. Y.) 357 (It was held that the life tenant had not made a feoffment and therefore no forfeiture of the life estate occurred; but the court went on to say that if such a feoffment were made and a forfeiture occurred "yet the reversioner is not bound to enter until the natural termination of the life estate, as the law does not require him to look after the estate, the presumption being that the tenant in possession holds by such a conveyance as the tenant for life had a right to give"); *Wallingford* v. *Hearl*, 15 Mass. 471: Parker, C. J., said: "If tenant for life acknowledge a fine for a longer time than for the life of the tenant for life, the fine may be good; but it is a forfeiture of the estate, and he in reversion or remainder may enter. Yet he is not obliged so to do, for he may wait the termination of the estate for life, and has five years after that (*Shep.*, "Touch." 14; *Jenk.*, *"Cent."* 254)"; *Stevens* v. *Winship*, 1 Pick. (Mass.) 317; *Miller* v. *Ewing*, 6 Cush. 34, 41.

7. *Doe* v. *Gregory*, 2 A. & E. 14, where the husband entered upon an estate by the marital right in lands of which his wife was the owner for life, and then he and his wife levied a fine in fee to themselves.

8. *Mixter* v. *Woodcock*, 154 Mass. 535 ("If the mortgages executed by her [the life tenant] may be regarded as acts of disseisin, so that the reversioner could have entered, he was not obliged to do so, but could wait until his right of entry accrued upon her death"); *Rigg* v. *Cook*, 4 Gilman 336 ("And where the possession has been consistent with, or in submission to the title of the real owner, nothing but a clear, unequivocal and notorious disclaimer and disavowal of the title of such owner, will render the possession, however long continued, adverse"); *Meacham* v. *Bunting*, 156 Ill. 586, 594.

9. *Mixter* v. *Woodcock*, 154 Mass. 535; *Central Land Co.* v. *Laidley*, 32 W. Va. 134; *Higgins* v. *Crosby*, 40 Ill. 260; *Orthwein* v. *Thomas*, 127 Ill. 554, 564, 568-570; *Mettler* v. *Miller*, 129 Ill. 630; *Peterson* v. *Jackson*, 196 Ill. 40; *Turner* v. *Hause*, 199 Ill. 464; *C. P. & St. L. R. Co.* v. *Vaughn*, 206 Ill. 234; *Bechdoldt* v. *Bechdoldt*, 217 Ill. 537; *Weigel* v. *Green*, 218 Ill. 227; *Schroeder* v. *Bozarth*, 224 Ill. 310; *Willhite* v. *Berry*, 232 Ill. 331; *McFall* v. *Kirkpatrick*, 236 Ill. 281; *Bartlow* v. *C. B. & Q. R. Co.*, 243 Ill. 332; *Cassem* v. *Prindle*, 258 Ill. 11 (life estate passed by condemnation.)

that the holding over after the death of the original life tenant by the one entering under a conveyance in fee from the life tenant did not become by that fact alone adverse to the remainderman.[10] This must proceed upon the ground that the transferee of the life tenant was in the same position as if he had obtained a conveyance expressly transferring only a life estate, and therefore must be regarded prima facie as holding over in conscious subordination to the remainderman. It is believed, however, that in American jurisdictions today the holding over would be regarded as prima facie adverse from the date of the death of the original life tenant.[11]

II

When the Life Tenant Is Disseised and the Remainder Is Vested

A—General Rule Approved by the Cases

Suppose the life tenant does not transfer the life estate but it disseised by A and A holds adversely to the life tenant for the statutory period.—What happens? It is clear that the life tenant is barred from again securing possession. The difficult question is: what is the effect of the running of the statute against the life estate upon the reversion or vested remainder?

It would have been a very simple answer to say that the life estate had been extinguished and that the vested remainderman had an immediate right to possession, so that the continued possession of A would be adverse to him. Indeed, it might have been urged that this followed from the fact that the running of the statute operated to extinguish the life estate, and that a vested remainder is by its very definition one which stands ready throughout its continuance to take effect in possession whenever and however the preceding freehold estate determines.[12] Such a view would have the advantage to the adverse claimant of causing the statute to begin to run against the remainderman as soon as it had run against the life tenant. It would have had the disadvantage to him that at once upon the running of the statute against the life tenant the remainderman would be entitled to possession.

The courts seem very clearly to have rejected this view and

10. *Doe* v. *Hull*, 2 Dowl. & R. 38.

11. In *Safford* v. *Stubbs*, 117 Ill. 389, such was the holding where the grantee in fee from the life tenant had no actual or constructive notice of any instrument creating a life estate in the grantor.

12. *Gray*, "Rule against Perpetuities," § 101.

to have proceeded upon the supposition that when the statute has run against the life tenant the adverse holder obtains an estate of some sort which is good against the remainderman as long as the life estate, which is extinguished by the adverse possession, would have been good against the remainderman—that is to say, in the usual case, during the life of the original life tenant. Accordingly, it has been regularly held that no right to possession arises on the part of the remainderman until the actual death of the original tenant for life, even though the remainder be vested and though the statute has run against the original life tenant. In the cases, therefore, where the reversioner or vested remainderman has sued for possession after the life estate has been barred, but before the death of the original life tenant, the action has failed.[13] So where the reversioner or vested remainderman sues for possession after the death of the original tenant for life, the possession of the disseisor of the life tenant does not become adverse to the reversioner or vested remainderman until the actual death of the original life tenant. Hence, the disseisor may still be ousted by the remainderman, though the statute has first run against the life tenant and then the possession of the disseisor has continued for the statutory period during the life of the original life tenant.[14]

What estate does the disseisor of the life tenant have after the statute has run against the life tenant only? If we said that the life estate passed to the disseisor and he became a tenant for the life of the original life tenant, we should be met with the general proposition that the statute of limitations operates to extinguish the title of him who is barred and to raise a new and original title in favor of the disseisor.

If we said that the disseisor obtains a new and original title in fee simple, good against all the world during the life of the tenant for life, but subject to a right to enter on the part of the remainderman upon the death of the original life tenant, we should run into the difficulty that the relation between the remainderman and the disseisor had been so changed as to prejudice the rights of the remainderman. For instance, what would have been waste on the part of a life tenant would not be waste when committed by the

13. *Shortall* v. *Hinckley*, 31 Ill. 219; *Jacobs* v. *Rice*, 33 Ill. 370; *Gregg* v. *Tesson*, 1 Black (66 U. S.) 150; *Higgins* v. *Crosby*, 40 Ill. 260; *Kibbie* v. *Williams*, 58 Ill. 30; *Moore* v. *Luce*, 29 Pa. St. 260; *Baker* v. *Oakwood*, 123 N. Y. 16; *Thompson's Heirs* v. *Green*, 4 Ohio State 216.

14. *Dawson* v. *Edwards*, 189 Ill. 60; *Wells* v. *Prince*, 9 Mass. 508; *Jackson* v. *Schoonmaker*, 4 Johns. (N. Y.) 390; *Tilson* v. *Thompson*, 10 Pick. (Mass.) 359; *Foster* v. *Marshall*, 22 N. H. 491.

holder of a fee, the remainderman being as to him merely one entitled to re-enter upon a future contingency, or the holder of what is in appearance at least a possibility of reverter.[15]

On the whole, perhaps the least objectionable position is that the disseisor of the life tenant becomes the holder of a new and original estate for the *life of the original tenant for life.*

B—Illinois Cases Apparently Departing from the General Rule as Above Stated, Dealt With

Where the life estate is that of a husband by the marital right in his wife's fee.

(1) *Before the first Married Woman's separate property act:* Before the first Married Woman's Act of 1861, which gave to married women their separate property as if they were femmes-sole, the husband of every woman with a fee simple had an estate for the joint lives of himself and his wife, known as the estate by the marital right. If the husband conveyed this estate, the grantee had an estate for life "pur autre vie"—namely, for the joint lives of the husband and wife. In that case clearly the wife must have become an actual reversioner. The wife or her heirs could have no right to possession until the death of the husband or wife. No possession could, therefore, become adverse to the wife or her heirs till the death of her husband, or till her death.[16] Suppose, however, that the husband did not convey. Suppose a disseisor entered and held possession for the statutory period and for such additional period after as the statute provided in the case of the disability of coverture—namely, according to the Statute of James I, the period of ten years after the coverture terminated. Did he disseise both the husband and wife so that the interests of both were barred and the fee acquired by the disseisor good against the world? Or did the disseisor bar only the husband's interest by the marital right so that there was no adverse possession against the wife or her heirs until the death of the husband or the wife?

On this question courts and judges have differed.

The Massachusetts Supreme Court at an early date held that it was only by reason of the peculiar legal relation of husband and wife that the actual seisin of the wife's fee was in the husband during the joint lives of husband and wife, thus giving the husband what was technically an estate for the joint lives of husband and wife;

15. *Ohio Oil Company* v. *Daughetee,* 240 Ill. 361; *Dees* v. *Cheuvronts,* 240 Ill. 486; Ill. Law Review, IV, 429.

16. *Higgins* v. *Crosby,* 40 Ill. 260; *Mettler* v. *Miller,* 129 Ill. 630.

that in fact the unity of husband and wife caused both together, and the husband as the representative of both, to have in their legal unity the entire fee and the seisin in fee; that while the husband had actual seisin by the marital right, there was in fact no separation of estates, but that the fee was in possession of the husband and wife. Hence, when the statute began to run against the husband, it ran against the wife's interest as well, and upon the completion of the twenty years required by the statute and the ten years in addition after the coverture was ended, the wife's interest was barred.[17]

This was consistent with the statute and its assumption that during coverture there might be adverse possession against a wife who had a fee and that she was permitted the period of ten years after the coverture ended in which to bring her action.

Other courts, however, have treated the wife as having an actual reversion in fee, subject to the husband's estate for life by the marital right, so that there could be no adverse possession whatever against the wife during coverture, and therefore upon the termination of the coverture the statute would first begin to run against the wife or the wife's heirs and they would be entitled to the full period of twenty years, although that might mean that the wife or her heirs were entitled to the running of the full period of the statute after the husband had during his life been disseised for forty years.[18] In Connecticut the opinions of four judges were equally divided as to which view was correct[19]

(2) *Effect of the Illinois Married Woman's separate property act of 1861—Castner* v. *Walrod*[20]: The first Illinois Married Woman's Act of 1861 operated to prevent the creation of any estate by the marital right in a husband for the joint lives of the husband and wife in the wife's fee. This act, however, had no general retroactive effect. A husband's vested estate by the marital right which existed at the date when the act took effect continued. If, therefore, the statute of limitations had run against the husband's life estate by the marital right before the act of 1861 and then the possession of the disseisor had continued after the act of 1861 for the statutory period while the husband and wife still lived, it might with great force have been urged that, in accordance with the rul-

17. *Melvin* v. *Locks & Canals*, 16 Pick. (Mass.) 161; *Kittridge* v. *Locks & Canals*, 17 Pick. (Mass.) 246.

18. *Foster* v. *Marshall*, 22 N. H. 491; *Shortall* v. *Hinckley*, 31 Ill. 219; *Jacobs* v. *Rice*, 33 Ill. 370; *Gregg* v. *Tesson*, 1 Black (66 U. S.) 150; *Kibbie* v. *Williams*, 58 Ill. 30 (semble); *Thompson's Heirs* v. *Green*, 4 Ohio State 216.

19. *Watson* v. *Watson*, 10 Conn. 77.

20. 83 Ill. 171.

ings already made by our Supreme Court,[21] the adverse holder had secured an estate good against all the world during the joint lives of the husband and wife, and that there could, according to the general rule, be no adverse possession against the wife or her heirs until the death of the husband or the wife, and then the full statutory period must run against the reversion.

Our Supreme Court, however, did not adopt this view. Instead it gave a mysterious effect to the Married Woman's Act of 1861 to reach the result adopted by the Massachusetts court prior to the time of any married women's legislation, that the disseisin of the husband was the disseisin of the husband and wife, and the statute began to run against both at the same time.

The first step toward this result was taken in *Castner* v. *Walrod*. In that case Hall agreed to convey to Haskins in 1849. Haskins' son assigned the bond for the deed fraudulently in the name of his father to Walrod. Haskins, the father, died in 1850. Walrod presented the bond to Hall, secured a deed and took possession. In 1869 complainants, who were the children of Haskins, filed a bill to obtain a conveyance pursuant to the bond. They were really attempting to enforce a constructive trust against Walrod who had the legal title. It was held that the complainants were barred by laches. Their claim was purely equitable and the doctrine of laches in equity and not the statute of limitations applied.

It was insisted on behalf of three of the complainants that when Walrod took possession of the land they were married women, and still were, and that this fact placed them under a disability which the statute of limitations recognized and which equity would also recognize. That was met by the ruling of the court that since the Married Woman's Act of 1861 there was no longer any disability of coverture under the limitation act[22] and equity would not recognize any such excuse for delay.

While not so precisely stated, the court recognized another argument on the part of the complainants who were married when Walrod took possession. It was this: The equitable interests in the

21. Ante, note 13.

22. The court said (page 178): "If, then, under the act of 1861, a feme covert became unmarried, so far as her property was concerned, the conclusion is irresistible that the saving clause in favor of married women, in the limitation law, was abrogated, as the two acts are so utterly inconsistent that they can not stand together."

Subsequent decisions have referred to *Castner* v. *Walrod* as holding that after 1861 the disability of coverture was removed, so far as the statute of limitations was concerned: *Enos* v. *Buckley*, 94 Ill. 458, 462; *Miller* v. *Pence*, 132 Ill. 149, 158.

fees of the married women were merely reversionary, since their husbands had the present interest in possession by the marital right which accrued before 1861 and was not disturbed by that act. The husbands were still living. Hence, it was contended, the wives could not be guilty of laches since they had no power to act.

There are a number of sufficient answers to this position which the court did not formulate. For instance, the wife's interest was only an equity to secure a legal title. The husband's estate by the marital right did not attach until the wife got in the legal title and became legally seized in fee. Hence, the husband and wife together had a right to sue for conveyance. The delay, therefore, was the delay of both and dated from the year 1850. Another answer might have been that since the husband and wife did not get in the legal title for the wife before 1861 the right of action to secure it became by the act of 1861 the wife's separate property and she was barred by laches from asserting it by reason of her delay since 1861, especially in view of the fact that she knew of all the circumstances since the year 1850. Another answer to the married women's position was that it was self-destructive. If the husbands had an estate for life by the marital right it still existed. The husbands were still living. Hence, it was contended, the wives could sion had not yet accrued, so that the complainants' case would fail.

The court, however, passed by these answers to the position of the married women and adopted another. It assumed for the sake of argument that the husband had a life estate by the marital right and that the wife's interest was reversionary. It then proceeded to hold that since the husband's estate by the marital right was barred before 1861 by the running of the statute, the continued possession of the disseisor after the act of 1861 for the statutory period barred the wife.[23]

The court thus in effect held that where a husband had a life estate by the marital right in the wife's fee before the Married

23. The court said (page 180): "The possession of the defendant commenced as early as 1850, and the statute of limitations then began to run as against the life estate in the husbands of the complainants. This life estate was, therefore, barred prior to the passage of the act of 1861, and when barred, it was, for all practical purposes, gone, and the husbands, in effect, no longer had any interest in the premises. . . . When, therefore, the life estate which the husbands had acquired by virtue of the marriage, was terminated by operation of the statute of limitations, and the act of 1861 removed the disability of coverture of the complainants, they were then bound to bring their action within seven years, or their right or title would be barred. This, complainants failed to do, but permitted the defendant to remain upon the land, undisturbed, for more than seven years after the passage of the act of 1861."

Woman's Act, and the husband's life estate was terminated by adverse possession before that statute, the Married Woman's Act operated to give the wife an immediate right to possession of her separate estate as if she were a femme-sole, and the continued possession of the disseisor became adverse to the wife and after the statutory period had run she was barred, though she and her husband were still alive.[24]

In short, while the act of 1861 had no retroactive effect to divest what was already vested in the husband, yet when the husband's estate for life by the marital right had already been divested by the statute of limitations before the act of 1861, that act became effective to give the wife a right to possession at once. This means that the act of 1861 was given a retroactive effect so far as the rights of the adverse holder (as one who had acquired an estate good against all the world during the joint lives of the husband and wife) were concerned. The estate for the joint lives of the husband and wife, which the disseisor would, by the operation of the usual rule already noted, secure by the operation of the statute, came to an end by the act of 1861, and the wife had an immediate right to possession. To this extent the act of 1861 operated retroactively.

Whether this proposition of *Castner* v. *Walrod* is right or wrong is perhaps of little if any importance today so long as its very limited application is observed. It only causes difficulty when counsel attempt to generalize from it that any possession will become adverse to any remainderman or reversioner as soon as any life estate is extinguished by the running of the statute—a proposition which, as already noticed, might have been the result of the authorities, but as a matter of fact has not been adopted by the courts.[25]

(3) *Enos* v. *Buckley*[26]: The dictum of this case goes the full length of holding that after the act of 1861 a disseisor of a husband having an estate by the marital right in the wife's fee is a disseisor of the wife also, and when the statutory period of adverse possession has run it bars the interests of both. Thus, in effect, the act of 1861 is given a mysterious operation to bring the court to the rule

24. Such is the statement of the holding in *Castner* v. *Walrod*, which was made by the court in *Mettler* v. *Miller*, 129 Ill. 630, 643, 644, where the court said: "In *Castner* v. *Walrod* it was held, that when the estate which the husband had acquired by virtue of the marriage, was terminated by operation of the statute of limitations, and the act of 1861 removed the disability of coverture, the wife was bound to bring action within seven years, or her right and title would be barred."

25. Ante, notes 13, 14.

26. 94 Ill. 458.

of the Massachusetts cases which held that prior to any married women's legislation a disseisin of the husband who had an estate by the marital right was at the same time a disseisin of the wife.[27]

In *Enos* v. *Buckley,* the husband and wife who had a record title brought ejectment in 1878. The defense was adverse possession for the statutory period from 1865 to 1872. When the adverse possession began in 1865, the wife who had the fee was married to her present husband, who then had an estate by the marital right in the wife's fee which arose prior to the act of 1861 and was not disturbed by that act. A judgment for the defendant was very properly affirmed. The husband's estate for life was clearly barred while the wife's reversion was not, but the husband and wife being still alive the wife had no right to possession when the ejectment was brought.

The court, however, appears to hold that since the act of 1861 the disability of married women under the limitations act had been entirely removed, and that this had the effect of causing the statute to run against a married woman as if she were femme-sole and regardless of whether the property was acquired by the married woman while covert before or since the act of 1861.[28]

So long as *Enos* v. *Buckley* is recognized as applying only where a husband who is seized of an estate by the marital right in a wife's fee as at common law is dispossessed and the adverse holding continues for the statutory period after the act of 1861, it is a matter of small importance whether it is sound or not. The danger of having the case in the supreme court reports is that counsel always, and even the court itself sometimes,[29] deduces from it the general proposition that any adverse possession against any life tenant is at once an adverse possession against any reversioner or vested remainderman—a proposition which it may safely be said no court has recognized and which all decisions, particularly those already noted,[30] holding that no adverse possession begins to run against a reversioner or remainderman until the actual death of the

27. Ante, note 17.

28. The court said (page 462): "We regard, then, under the decision in the case of *Castner et al.* v. *Walrod,* that since the passage of the Married Woman's Act of 1861, the saving clause in favor of married women in this limitation law has no force, and that the statute since that time applies against a married woman equally as against an unmarried woman, without regard to whether the property of the married woman be strictly in legal understanding, before the passage of the act, her separate property or not, and without regard to the time of its acquisition, whether since or before the passage of the act, whether during or before coverture."

29. *Nelson* v. *Davidson,* 160 Ill. 254: *post* (p. 575); *Field* v. *Peeples,* 180 Ill. 376: *post* (p. 576).

30. Ante, notes 13, 14.

original tenant for life, no matter how long the original life tenant may have been disseised, repudiate. Furthermore, it should not be overlooked that if any such general rule were announced and applied, it would be void under the Fourteenth Amendment of the federal Constitution as a deprivation of the remainderman's property without due process of law, and the decision of a state supreme court should be reversed by the United States Supreme Court on that ground.[31] A remainderman who has no right to sue for possession till the death of the original tenant for life cannot constitutionally be barred by any possession of a disseisor during the life of the original tenant for life.

The fact is, however, that in the dicta of *Nelson* v. *Davidson*[32] we find the court using the dicta of *Enos* v. *Buckley* for the general proposition that when the statute begins to run against any life tenant it begins to run against the remainderman. In *Field* v. *Peeples*,[33] our Supreme Court seems to use *Enos* v. *Buckley* for the proposition that when the statute has run against any life tenant it also runs against any reversioner or remainderman under any disability such as infancy, so that the remainderman must within the additional time allowed by the statute sue for possession although the original life tenant still lives. It is important, therefore, that these two cases be carefully analyzed, and the dicta of the court, which are derived from a misconception of *Enos* v. *Buckley* and which cannot be supported, be separated as far as possible from the actual decision in each case.

Where the disseisor of the life tenant enters under a void

31. *Higgins* v. *Crosby*, 40 Ill. 260 ("It would be unprecedented to hold that a right of entry was barred where such a right had never accrued. A party cannot be prejudiced by the non-assertion of a right that does not exist."); *Mettler* v. *Miller*, 129 Ill. 630, 642, 643 ("All statutes of limitation are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice, and would be to *deprive such person of his estate without his day in court*").

It should be observed also that the Illinois seven-year statute of limitations as to vacant lands was first held unconstitutional as a taking of property without due process of law because there was no sufficient substitute in the act for adverse possession: *Harding* v. *Butts*, 18 Ill. 503. The act was only held valid as a limitation act by reading into it the requirement that the claimant, after seven years' payment of taxes under color of title, must enter and take possession in order to complete the bar of the statute: *Newland* v. *Marsh*, 19 Ill. 376; *Dunlap* v. *Taylor*, 23 Ill. 387; *McCagg* v. *Heacock*, 34 Ill. 476; 42 Ill. 153.

32. 160 Ill. 254: post (p. 575).

33. 180 Ill. 376: post (p. 576).

guardian's sale of the reversioner's interest—Nelson v. *Davidson*[34]: In this case the mother died in 1845, leaving her husband tenant for life by courtesy, and Mary her heir at law, the reversioner. In 1852, the father as guardian for Mary purported to sell at a guardian's sale the minor's interest. In 1892 the father died. Mary brought ejectment in 1896. The defense was a regular chain of title from the purchaser at the guardian's sale and possession, payment of taxes under color of title during the ten years immediately preceding 1892. Judgment for the defendant was affirmed.

The court first held that the objections to the guardian's sale were trivial and not well founded. That disposed of the case, for the guardian's sale transferred the remainder and the life estate had been barred by the statute of limitations as well as terminated by the death of the life tenant.

The court, however, went on to deal with the case on the supposition that the guardian's sale was void for irregularity and reached the conclusion that even in that event the defendant was entitled to judgment. The problem of the case is: how can this dictum be supported?

Can it be sustained on the ground that the void guardian's sale was made valid by the laches, estoppel and affirmance of the minor?[35] The guardian's sale if void was so, not on the ground that the minor's interest was contingent and therefore not transferable, but because of irregularities in the proceedings to sell an interest, which, however, was alienable by guardian's sale. It is true also that the reversioner came of age in 1863, thirty years before bringing suit. It must be very doubtful, however, if the reversioner could have filed any bill to remove the guardian's deed as a cloud, for she was not in possession and the property was not vacant. Nor was there any evidence that the minor ever received any part of the purchase price paid at the guardian's sale after she came of age. The case presented, therefore, is not, it is submitted, sufficient to bar the complainants from attacking the guardian's sale if it were actually void.[36]

What the court appeared to go upon was a generalization from the dictum of *Enos* v. *Buckley*—namely, that an adverse possession against *any life* tenant is at the same time an adverse possession against *any reversioner*.

34. 160 Ill. 254.

35. See *Tracy* v. *Roberts*, 88 Me. 310; *Price* v. *Winter*, 15 Fla. 66, 121; *Penn and Wife* v. *Heisey*, 19 Ill. 295; *Walker* v. *Mulvean*, 76 Ill. 18, 20; *Byars* v. *Spencer*, 101 Ill. 429, 436.

Such a generalization cannot be supported. It cannot properly be extracted from *Enos* v. *Buckley,* for that case dealt only with the effect since 1861 of an adverse possession against a husband holding an estate by the marital right in the fee of his wife to bar the right of the wife. It was merely a reversion to the Massachusetts common law rule that a disseisin of the husband who had only an estate by the marital right in his wife's fee was at the same time a disseisin of the wife. In *Nelson* v. *Davidson,* when the adverse possession began, the life tenant was a widower who had an actual estate for life by courtesy. The reversioner was the heir of the wife. Under these circumstances, the dictum of *Enos* v. *Buckley* could have no application. The dictum of *Nelson* v. *Davidson* runs counter to the general rule which must be regarded as established in this state, not only by express decision[37] but also by statute,[38] that an adverse possession against a life tenant not only does not become adverse to the remainderman when the statute has run against the life estate, but does not become adverse to the reversioner until the actual termination of the life or lives which measure the duration of the original estate for life. The dictum of *Nelson* v. *Davidson,* in fact, approves a rule which if actually applied would amount to a taking of the reversioner's property without due process of law.

Field v. *Peeples*[39]: The Supreme Court in this case appears to approve the proposition attributed by it to *Enos* v. *Buckley* and *Nelson* v. *Davidson,* that when adverse possession commences against any life tenant it immediately begins to run against any remainderman under any disability such as infancy, so that when the

36. In *Woodstock Iron Co.* v. *Fullenwider,* 87 Ala. 584, the reversioner was barred by laches, estoppel and affirmance from attacking an administrator's sale of his interest which was void for irregularity. But in that case the purchase money had been paid to the administrator and used for the payment of debts. The reversioner made no offer to repay it and he could have filed a bill to remove the conveyance as a cloud during the continuance of the life estate. Under these circumstances he allowed twenty years to elapse before taking action.

37. Ante, notes 13, 14.

38. Section 3, subsection third of the Limitation Act of 1872 (R. S. 1874, chapter 83, section 3, subsection third): "When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time."

This section has been referred to and declared to govern the other sections of the Limitation Act. See *Turner* v. *Hause,* 199 Ill. 464; *Weigel* v. *Green,* 218 Ill. 227.

39. 180 Ill. 376.

statute has run against the life tenant before the disability is removed, the remainderman must sue within the additional time allowed by the statute after the disability is removed or be entirely barred.

By a will which took effect in 1871, Ellen became life tenant with a vested remainder in her children who were then born. In 1894, while the life tenant was still alive, but after she had conveyed in 1893 all her interest to her children, the children brought ejectment against the defendant in possession. A judgment was entered for the plaintiffs, the two children, Clarence and Cornelia.

In the Supreme Court the defendants successfully contended that all the interest of Clarence had passed to them by a guardian's sale of 1873. Hence, the judgment was reversed. That really disposed of the case. But the court, in order apparently to settle further questions, intimated that the other child, Cornelia, not having had her interest sold by the guardian would be entitled to judgment for her share.

It was this suggestion of the court that the defendants sought to combat. They relied upon the fact that they had had adverse possession against the life tenant so that the life estate was barred. As a result of this they claimed a right to possession good as against all the world during the life of the original life tenant who was still living. There was evidence of possession and payment of taxes from 1883 to 1894 and the court seems to have assumed that there was also color of title. Nevertheless, the defendants failed in this defense because no issue was presented by the pleadings which would entitle them to claim an estate for the life of the original life tenant by the statute of limitations.[40] The defendant no doubt

40. The court said (page 383): "The fact that the statute of limitations might have been successfully interposed as a defense had the action been brought by Ellen Pool Peeples, has no special bearing on this case. Here, appellees are claiming to recover as owners of the fee, and it is not claimed, as we understand the argument, that they are barred by the statute of limitations." On the rehearing, the court said (page 389): "The right of possession under color of title to the life estate is not involved in the case. Plaintiffs below, by their declaration, claimed the premises in fee, and the defendant, both by virtue of the guardian's sale and deed and possession under that deed as claim and color of title and payment of taxes for more than seven years, also claimed the title in fee simple. He does not claim color of title to the life estate, and counsel are therefore mistaken in the assertion that the opinion heretofore filed overrules cases cited, to the effect that when the bar of the statute is complete the holder of the title by limitation may assert it against all others; that his right of possession is as perfect as though he were invested with a paramount title, and that his title is as available for attack as defense. The petition, and argument in support of it, assume a state of case not shown by this record. If appellant had set up and shown color of title to the life estate, and relied upon that title under the statute of limitations, then the position here contended

claimed the fee under the statute of limitations. This would be an affirmative defense. If the defendant were successful in maintaining it, the plaintiff would have been adjudicated out of the fee. Hence, the issue raised was not whether the defendant had an estate for the life of the original life tenant by the statute, but whether the fee of the remainderman had been barred by the statute so that the defendant would have the fee as against the remainderman. Whether the court was right or wrong about this is not material to the present discussion. That is the position which it took and that disposed of the case.

As a parting shot, however, to the defendants on the rehearing, the court called attention to the decisions in *Enos* v. *Buckley* and *Nelson* v. *Davidson,* and said that the court in those cases held,

"that possession for the statutory period, under claim of title, to an estate in fee, sufficient to constitute color of title, with payment of taxes for the same period, would bar the estate in remainder, notwithstanding the existence of the outstanding life estate, where the remainderman claiming title was under no disability."

The court then concludes that in view of such holdings the plaintiffs were bound to bring their action within two years after they came of age, and therefore could not wait until the death of the original life tenant.[41] This is a plain intimation that when a remainderman is under any disability, whether of coverture or infancy, the statute of limitations begins to run against him as soon as it commences to run against the life tenant, but that the remainderman under a disability of infancy has the additional time after that disability is removed within which to sue, and must sue within that time or be forever barred. This dictum of the court again overlooks the fact that when a remainderman is under no disability, the statute does not begin to run against him until the original life tenant actually dies, and the fact that the reversioner is under a disability does not put him in any worse position, or any better for that matter. The dictum of the court in *Field* v. *Peeples,* like the dictum of the court in *Nelson* v. *Davidson,* fails to observe that

for would have been tenable. In that case the remaindermen would undoubtedly have been postponed in their right of action until after the death of the life tenant, but under the issues in this case they were bound to bring their action within the time limited by the statute after they became of age, and if they had delayed their action until the death of their mother, and that event had occurred more than two years after they became of age, they would have been barred."

41. The court said (page 390): ". . . it cannot be held that plaintiffs below were bound to bring their action within two years after they became of age, and, at the same time, that they had no right to do so until after death of the life tenant."

the dictum of *Enos* v. *Buckley* applied only where a husband holding by the marital right in his wife's fee was disseised after the act of 1861. The dictum of *Field* v. *Peeples,* like that of *Nelson* v. *Davidson,* runs counter to the many cases already noted,[42] which support the general rule that reversioners and remaindermen have no right to possession until the actual death of a life tenant who has been disseised, and whose estate for life has been barred by the statute.

C—Miscellaneous Problems

Suppose the life estate is released to the vested remainderman, or both the life tenant and the vested remainderman convey to a third person: (1) Suppose the vested remainderman is using the release or conveyance as the basis of a merger to enable him to secure possession from the adverse holder before the actual death of the life tenant.

He will, of course, succeed if the adverse possession has not yet barred the life tenant. If, however, the statute has run against the life tenant when the conveyance relied on to effect the merger occurs, there cannot be a merger which will prejudice the adverse holder whose possession is protected until the actual death of the life tenant.[43]

If, however, when the conveyance which is relied upon to effect a merger is executed, the statute has not run against the life tenant but subsequently it does so before the remainderman sues for possession, will the adverse holder's possession be protected for the life of the original life tenant? This has been answered in the affirmative[44] on the ground that the merger will not be permitted to prejudice the situation of the adverse holder after the possessory title has become good against the life tenant. Perhaps this might be expressed by saying that when the adverse possession becomes complete to bar the life tenant, the adverse holder's title relates back

42. Ante, note 13.

43. *Moore* v. *Luce,* 29 Pa. St. 260; *Baker* v. *Oakwood,* 123 N. Y. 16; *Jacobs* v. *Rice,* 33 Ill. 370; *Gregg* v. *Tesson,* 1 Black (U. S.) 150.

The remarks of the court in *Field* v. *Peeples,* 180 Ill. 376, are not contra, because the court there held that whether the life tenant was barred by the statute so as to give the adverse holder an estate good against the world during the life of the original life tenant was not involved. The moment it is assumed, under the issue made, that the life estate might have continued, the court could with propriety say that the conveyance by the life tenant to the remainderman would give the remainderman an immediate right to possession by the doctrine of merger.

44. *Shortall* v. *Hinckley,* 31 Ill. 219; *Kibbie* v. *Williams,* 58 Ill. 30 (semble).

to the beginning of the adverse possession and therefore as to him no merger has ever occurred.

(2) Suppose now the disseisor is using the attempted merger to contend that adverse possession began against the remainderman upon the termination of the life estate by merger and therefore the remainder is barred by the statute, although the statutory period has not run since the death of the original life tenant.

Clearly after the statute has run against the life estate the original life tenant's interest is gone and there can be no merger by his release or conveyance at that time.[45] If the release or conveyance by the life tenant occurred before any adverse possession began, clearly a merger occurs and when the adverse possession does commence there is no reversioner or remainderman, and the statute runs against the entire fee at once.[46]

The difficult case is where the release or conveyance, which is the basis for the merger, occurs after the statute has begun to run against the life tenant, but before the life estate is barred, and then the statute does run completely against the life tenant and would have run against the remainderman if it had started to run against the remainder at the time of the alleged merger. It is submitted that a merger which could not be used against the adverse holder where the remainderman was seeking possession could not be used for him. If the disseisor's possession bars the life estate by relation back so as to prevent any merger, that will equally prevent any adverse possession against the remainderman from the time of the alleged merger. The result is that when an alleged merger occurs after a disseisin of the life tenant, the reversioner or remainderman can sue at once for possession, and hence the possession becomes adverse to the remainderman, but when the life estate is barred, then the adverse possession against the remainderman ceases and does not begin again until the death of the life tenant, and then must run for the entire statutory period. However incongruous this may seem, it would appear to be the logical and necessary result of the taking effect of a limitation title by relation back to the time when the adverse possession commenced.

It becomes important in applying the statute of limitations to determine whether a life estate is subject merely to a forfeiture for a breach of condition, or whether it comes to an end by express limitation before the life tenant's death: If a life estate is sub-

45. *Talcott* v. *Draper*, 61 Ill. 56; *Peadro* v. *Carriker*, 168 Ill. 580 (semble).

46. *Whitaker* v. *Whitaker*, 157 Mo. 342; *Boykin* v. *Ancrum*, 28 S. C. 486.

ject to forfeiture for breach of an express condition subsequent, no forfeiture will occur until the one entitled to enter for the breach elects to declare the forfeiture, and in an appropriate way completes the forfeiture.[47] No possession can therefore become adverse against the remainderman or reversioner until the forfeiture has been perfected.

If, on the other hand, a life estate is expressly made terminable upon an event other than the death of the life tenant—as, for instance, alienation by the life tenant—and the event happens, the remainderman is at once entitled to possession and the possession of a disseisor of the life tenant at once becomes adverse to the remainderman.[48]

Suppose the remainderman is also interested in the life estate: Suppose, for instance, a trustee acquires an estate for the life of a wife in trust for the wife and her children during the life of the wife, with a legal remainder to the children of the marriage. Suppose the trustee is disseised and the legal estate for life barred by the running of the statute. Is the usual rule that the statute does not run against the remainderman until the death of the original tenant for life altered by the fact that the remaindermen are themselves interested in the life estate? Clearly not.[49] The interests of the children are different and separate. In barring their several interests, the statute must be applied to each separately.[50]

If, however, the trustee holds the *fee* and conveys that in breach of trust, there is no question of the statute of limitations in a suit to enforce the trust against the transferee of the land conveyed. The legal title has passed. The only question is whether the equitable remaindermen are barred by laches from recovering the trust res from one who takes with notice of the trust. It might well be urged that the vested equitable remainderman or reversioner had a right to sue at once to have the trust estate restored to the trustee to hold upon the trusts designated, and that laches on the part of the remainderman would commence at once upon notice of the breach of trust and the removal of any disability, such as infancy. The same might be true even if the equitable remainder were contingent on the remainderman surviving the equitable life tenant. If, however, we add the fact that the equitable remaindermen, whether having a vested or contingent interest, also have a

47. Ante, notes 5, 6.
48. *Barnes* v. *Gunter*, 111 Minn. 383.
49. *Franke* v. *Berkner*, 67 Ga. 264; *East Rome Town Co.* v. *Cothran*, 81 Ga. 359; *Graff* v. *Rankin*, 250 Fed. 150.
50. See also *Mara* v. *Browne* [1895], 2 Ch. 69.

present equitable interest in the equitable life estate, there can be no doubt of their right to sue to have the trust estate which has been transferred in breach of trust turned back to the trustee for the purposes of the trust—and not only for the purposes of the present equitable interests but to serve the future equitable interests as well. In such a case then, the period of laches would commence to run from the knowledge of the breach and the removal of any disability.[51]

III

Where the Remainder Is Contingent

The statute cannot begin to run against the remainderman till the event happens upon which the remainder is to vest: Where the remainder is subject to a condition precedent to its vesting which does not happen till the life tenant's death, there can be no right to possession by the remainderman till the event has happened, and no possession can be adverse to the remainderman till then. This is clearly so where one in possession during the life of the original life tenant takes by deed from the life tenant.[52] It is equally so where the life tenant is disseised.[53] Even where a husband who owns in fee has been disseised and the fee is barred, the statute will not run against the wife's contingent dower interest until the husband's death.[54]

Even though the dictum of *Nelson* v. *Davidson* were accepted, that adverse possession against any life tenant becomes at once adverse to any remainderman so that both are barred when the statutory period has once run, it has very properly been held that such a rule could have no application to a remainder which was contingent upon an event which was to happen or not only on the death of the life tenant. In such a case there can be no right to

51. This is the explanation of *McCoy* v. *Poor*, 56 Md. 197, where forty-nine years elapsed after the breach of trust and the coming of age of some of the equitable remaindermen, and thirty-six years elapsed after the youngest remainderman came of age before suit was brought, and seven years had elapsed after the equitable life tenant's death before suit was brought.

This case is sometimes erroneously cited for the proposition that if the remainderman is also interested in the life estate and has permitted his interests therein to be barred, the statute bars the remainderman. See *Graff* v. *Rankin*, 250 Fed. 150.

52. *McFall* v. *Kirkpatrick*, 236 Ill. 281; *Hill* v. *Hill*, 264 Ill. 219.

53. *Graff* v. *Rankin*, 250 Fed. 150.

54. *Steele* v. *Gellatly*, 41 Ill. 39; *Whiting* v. *Nicholl*, 46 Ill. 230; *Brian* v. *Melton*, 125 Ill. 647; *Miller* v. *Pence*, 132 Ill. 149.

possession until the event happens and only then can the possession of the disseisor of the life tenant become adverse to the remainderman.[55]

Where the life tenant is barred by the statute will a legal contingent remainder be destroyed? If the effect of the running of the statute against a life estate were to transfer the life estate originally created to the adverse holder, then, of course, there could be no destruction of any legal contingent remainder by the running of the statute against the life estate.

We may, however, assume that when the statute runs against the life tenant, the original life estate is destroyed, or brought to an end. The life tenant no longer has any right of entry or right of action. That such a state of affairs operated to destroy the contingent remainder seems to have been the view of both Fearne and Butler.[56]

This conclusion must have rested upon the further fact, not stated, that the reversioner (pending the vesting of the contingent remainder) had an immediate right to possession as soon as the life estate was extinguished. Under such circumstances, the contingent remainder, if it took effect at all upon the happening of the contingency, would be bound to do so as a springing executory interest cutting short a previously vested reversion in fee. Rather than permit a contingent remainder to take effect in this way it was held void and destroyed. The American authorities, however, clearly deny to the reversioner any right of entry during the life of the original life tenant and protect the disseisor in his possession during the life of the original life tenant.[57] Hence, if Fearne's opinion rests upon the fact that the reversioner has a right of entry as soon as the life estate terminates by the running of the statute, his opinion cannot be used in this country as the basis for the destruction of a legal contingent remainder by the running of the statute against a preceding life estate.

---

55. *Graff* v. *Rankin*, 250 Fed. 150.

56. *Fearne* "C. R." 287: "Thus, if A be tenant for life with a contingent remainder over, and tenant for life be disseised, all the estates are divested; but the right of entry of tenant for life will support the contingent remainders; but in this case, if the contingent remainder does not vest before such a descent be cast as will take away the entry of tenant for life within the statute of H. 8, c. 33, and drive him to his action, then is the contingent remainder gone; because there no longer subsists any right of entry to support it, that right being turned into a right of action."

Butler in his note says: "that, when, by the death of the disseisor, or by *any other means*, the right of entry under a previous estate is lost, there is no longer a rightful estate, capable of supporting the contingent remainder."

57. Ante, note 13.

If the disseisor were regarded as obtaining a fee simple which was good during the life of the original tenant for life against the reversioner, and the contingent remainder took effect like a shifting executory interest after a prior fee, it is hardly probable that it would be held void and destructible.[58]

Suppose, however, that the disseisor of the life tenant were held to acquire a new title to an estate for the life of the original life tenant—a view heretofore put forward as the least objectionable consistent with the authorities.[59] Why under such circumstances should the contingent remainder be destroyed? There is a freehold to support it. Indeed, the series of estates would be almost precisely the same as where "A" was given a life estate with an estate to "B" and his heirs for the life of "A" to preserve contingent remainders, with a contingent remainder to the eldest son of "A." In such a case if "A's" life estate terminated before "A's" death and before "A's" first son was born, "B" would step into a freehold for the life of "A" to preserve the contingent remainder. So in the case put, the disseisor obtains a new freehold for the life of the original tenant for life and no reason is perceived why this should not operate to preserve the contingent remainder.

IV

Where the Adverse Claimant Has No Notice, Actual or Constructive, of the Instrument Creating the Life Estate

Results of the cases stated: Where the instrument which creates the life estate and remainder or reversion is not recorded and the adverse holder or holders have no actual notice of it,[60] adverse possession for a single statutory period is sufficient to give the disseisor a title in fee valid against both the life tenant and the remainderman or reversioner.[61]

In the application of this rule it makes no difference whether the adverse holder takes by deed from the life tenant[62] or disseises the life tenant, or whether the remainder is vested or contingent.

58. This is not, however, entirely certain. See *Kales*, "Cases on Future Interests," page 120, Moot case.

59. Ante (pp. 567, 8).

60. *Graff* v. *Rankin*, 250 Fed. 150; *Weigel* v. *Green*, 218 Ill. 227; *Dugan* v. *Follett*, 100 Ill. 581.

61. *Dugan* v. *Follett*, 100 Ill. 581; *Lewis* v. *Pleasants*, 143 Ill. 271; *Lewis* v. *Barnhart*, 145 U. S. 56.

62. *Dugan* v. *Follett*, 100 Ill. 581; *Lewis* v. *Pleasants*, 143 Ill. 271.

The rule evidently proceeds upon the theory that the adverse holder takes from the one who appears of record to have the fee, and such transferee takes free from all unrecorded instruments and interests thereunder. The premise here is hardly correct. The adverse holder does not take title from any one. He holds in opposition to that title. He extinguishes a former title and obtains under the statute a new and original one. In this position he certainly does not fall within any protection given by the recording acts.

On the other side, the remainderman is equally barred from suing whether the instrument which creates the remainder is recorded or not. Where the title rested, as it mostly does in this class of cases, in an ancestor who is dead, there is much carelessness in the recording of a will in all counties where the lands lie so as to give notice under the recording acts. The remainderman has some cause for complaint, when he sues for possession after the life tenant's death, to find that he has been barred because the adverse holder had no notice, actual or constructive, of the instrument which created the estates due to some technical defect in recording a will or to a failure to record it where the land lay.

Nevertheless it must not be forgotten that the American cases which give the remainderman no right to possession till the actual death of the original tenant for life, and hence permit no adverse possession to begin against the remainder until that time, have allowed reversioners and remaindermen to recover forty or sixty years after the adverse possession commenced against the life tenant. No doubt this has often appeared to be a great hardship and the courts have to some extent been driven to giving the recording acts an extraordinary operation in order to prevent such results.

INDEX

A

ACCEPTILATIO, 424, 426 f., 433.
Acceptilatio Litteris, 422 f.
Accessories (Chinese Criminal Code), 84.
Accursius, 272.
Acte Administratif, 74.
Acte de Gouvernement, 64, 66.
Actio Cognita Causa, 428, 432.
Actio de Dolo, 430 f.
Actio Directa, 418.
Actio ex Stipulatu Utilis, 418.
Actio Pauliana, 430, 432; 471.
Actio Personalis Moritur cum Persona, 151.
Actio Rei Vindicatio, 418.
Adams, on political theory, 288.
Adams v. *Lindsell* (1 B. & Ald. 681), 526.
Adat Law, 58 f.; Commission on, 61; Assistant Commission on, 61; Pandects of, 61; Foundation, 62.
Adat Law Commission, 61.
Adat Law Foundation, 62.
Administrative Law, development from civil law, 36; modern French, compared with Common Law, 63 f.; administrative action, 139 f., 144 f.; 146 f.
Adoption, as a substitute for the will, 541.
"Adverse Possession against Reversioners and Remaindermen," by *Albert M. Kales*, 564 f.; under a conveyance from the life tenant, 564 f.; when the life tenant is disseised and the remainder vested, 566 f.; where the remainder is contingent, 582 f.; where the adverse claimant has no notice, 584 f.
Ægidius Romanus, 293.
Affatomie, 540.
Age, consideration of, in reduction of punishment (China), 82.
Agency, laxness of standards in, 12.
D'Aguesseau, 220.
Ahrens, on the will, 538.
Alciatus, 152.
Alcuin, 271.
"A Legal Heresy," by *John M. Zane*, 255 f.
Alston, 307.
ALVAREZ, ALEJANDRO, "New Conception and New Bases of Legal Philosophy," 25; biographic note, 25.
Ambrose, St., 268 f.; 318.
American Association of Labor Legislation, 146.
American Institute of International Law, 37.
Analytical Jurisprudence, 151 f.; liability, 155 f.; possession, 170 f.; consideration in equity, 435 f.; mutual assent, 525 f.
Analytical Theory of nature of law, 448.
Angers v. *Queen Ins. Co.* ([1878] 3 A. C. 1090), 333.
Anglo-American Law, unsystematic character of, 438.
Anglo-Saxon Charters, 385 f.
"Anglo-Saxon Documents of the 8th and 9th CC., Preliminary Notes upon," by *Francesco Brandileone*, 384.
Anglo-Saxons, legal philosophy of, 27, 29; accept law only in positive sense, 30; have a horror of general principles, 31; study law chiefly as a professional matter, 32.
Animus Domini, 172, 178, 181.
Animus Possidendi, 172, 177.
Anson, political theory, 288.
Anthropological School, in criminology, 98.
Arbitration, compulsory, 21.
d'Argentré, 201 f.
Aristotle, II, 259, 286; 292 f., 303 f.
Army, departments of Roman, 381 f.
Artificial Kinship, 542.
Asser, on domicile, 196.
Assistant Adat Law Commission, 61.
Assizes of Jerusalem, 273.
Atkinson, 46.
Attempt (Chinese Criminal Code), 83.
Attornati Regis, 395.
Attorneys, 394 f.
Attorney General, 394 f.; modern patent of, 409; writ of attendance, 410.
Atty. Gen. of Australia v. *Colonial Sugar Refining Co.* ([1914] A. C. 237), 324.
Atty. Gen. of Canada v. *Cain* ([1906] A. C. 542), 350.
Atty. Gen. for Canada v. *Atty. Gen. for Ont.* ([1898] A. C. 243), 349.

Atty. Gen. of Canada v. *Attys. Gen. etc., of Ont., etc.* ([1898] A. C. 700), 347, 348.
Atty. Gen. of Columbia v. *Atty. Gen. of Canada* ([1889] 14 A. C. 295), 349.
Atty. Gen. of Man. v. *Man. Assn.* ([1902] A. C. 73), 350.
Atty. Gen. of Ont. v. *Atty. Gen. for Canada* ([1912] A. C. 571), 353.
Atty. Gen. for Ont. v. *Atty. Gen. for Canada* ([1916] A. C. 598), 353.
Atty. Gen. for Ont. v. *Atty. Gen. for Dom.* ([1896] A. C. 348), 329, 336, 350.
Atty. Gen. for Ont. v. *Hamilton, etc., R.* ([1903] A. C. 524), 349.
Atty. Gen. v. *Mercer* (8 A. C. 867), 348.
Augustine, St., 268; 384.
Austin, 19; 30; 285.
Austinian Theory of Law, 19.
Automatic Checks, on legislation, 142.
Automobiles, liability arising from use of, 158.
Avaries Communes, 75.
Avebury, Lord, 42.
Aylesworth, Sir Allen, report as Minister of Justice, 331.
Aylmer, "Harborowe," 311.
Azo, 272 f.

B

BABYLON, wills unknown in the law of, 540; recognized transfers involving usufructuary rights, 541.
Bacon, Lord, 282; 401, 402, 405.
Bagehot, essay on English constitution, 287 f.
Baldus, 216; 256, 267, 276 f.; 301.
Banjokenkyukwai, 61.
Bank of Toronto v. *Lambe* ([1887] 12 A. C. 587), 331.
Bankers, a text of Roman law on sales by, 412 f.
Banks, 401.
Barbosa, 152.
Bartolus, 205 f.; 276 f.; 297; resembled Fortescue, 291; 295.
BATY, TH., "The Interconnection of Nationality and Domicile," 187 f.; biographic note, 187.
Beati Possidentes, 151 f.
Beaumanoir, Sire de, 274.
Becket, Thomas à, 273.
Bedford v. *Smiles* (1 Ont. 436), 343.
"Beginnings of English Constitutional Theory," by *H. J. Randall*, 287 f.
Bellarmine, Cardinal, 281.
Bentham, 30; 292; criticism of primogeniture, 553.
Beschikkingsrecht, 59, 61.
Best, on "Evidence," 485.
Bishop, on marriage law, 42.
Birch, Cartularium of, 385.
Bismarck, 151; on the plebescite, 251.
Black v. *Imp. Book Co.* (8 Ont. 9), 343; (35 Can. S. C. R. 488), 344.
Blackstone, 30; 244, 246 f.; 292; 536, 538; doubted propriety of unlimited testation, 553.
Blaine, objection to enforced naturalization by Brazil, 188.
"Bleak House," 17.
Bluntschli, 547.
Bôc, 385, 389.
Bôcian, 389, 390.
Bôcland, 388, 390.
Bôc Syllan, 389.
Bodin, 256, 258, 277, 279 f.; 292, 305, 307, 311, 315; "Commonwealth," 321 f.
Bonanza Mining Co. v. *Rex* ([1916] A. C. 566), 351.
Boniface VIII, 279.
Book of Common Prayer, 312.
Bossuet, 63.
Bouhier, 220.
Boullenois, 220.
Boussinière Will, the, 468.
Bracton, 151, 267, 270, 274 f.; 291.
BRANDILEONE, FRANCESCO, "Preliminary Notes upon the Anglo-Saxon Documents of the 8th and 9th Centuries," 384 f.; biographic note, 384.
Breach of Promise to Marry, under the Statute of Frauds, 486 f.
Brewer, Justice, 257.
Brian (Chief Justice), 525.
Bright, John, 12.
British Rule, ethical effect of, 13.
BRODIE-INNES, J. W., "Some Curiosities of International Marriage Law," 41 f.
BROWN, W. JETHRO, "The Latest Phase in Legal Evolution," 18 f.; biographic note, 18.
Bromley, 401.
Brougham, Lord, 53, 56.
Brown, Justice, 258.
Brown v. *Notley* (3 Exch. 219), 183.
Browne, Causten, on the "Statute of Frauds," 474 f.; 480, 496 f.
Brunner, on the landbôc, 388, 389, 391, 392, 393.
Bureau of Insular Affairs, 58.
Burgundus, on territoriality of criminal law, 217.
Burlamaqui, copied by Blackstone, 538.
Bushell's Case (Vaughan 135), 549.

C

CABILISTS, 44.
Campbell, Lord, untrustworthy biographies by, 10; on construction of statutes, 481.
Canon Law, influence of, 29; 540, 544.
Carle, 33.
Carpzovius, B., 152.
Carta, 385.
Carta Primitiva, 388.
Cartula, 385.
Castlereagh, on forced equality in successions, 552.
Castner v. *Walrod* (83 Ill. 171), 570.
Catellani, 222.
Caton v. *Caton* (L. R. 1 Ch. App. 137), 492.
Causa, 451 f.
Causa Civilis, 450, 455 f.
Causa Debendi, of Germanic law, 451 f.
Celsus, 418.
Certa Pecunia, 424.
Chapman v. *Gibson* (3 Bro. C. C. 229), 458.
CHARMONT, JOSEPH, 33; "The Conflict of Interests Legally Protected in French Civil Law," 461 f.; biographic note, 461.
Charondas le Caron, 280.
China, oldest criminal code in, 77; draft criminal code, 79 f.; adoption as a substitute for the will in, 541.
Chirographum, 385.
Chirographum Primitivum, 388.
Christie, 60.
Cicero, 6; on legislation, 7; not esteemed an authority in Common Law, 7; on Natural Law, 8; 48; on Justice, 259; 269, 272, 286; on justification for war, 383.
Citizens Ins. Co. v. *Parsons* ([1881] 7 A. C. 96), 335, 336.
Civilis Possessio, unknown in Indonesia, 59.
Clement "Canada's Federal System," 343, 346.
Codes, moral effect of English, on colonies, 13; no popular voice in, 14; Justinian, Napoleonic, Anglo-Indian. German, 14; industrial law, 19; revision of Chinese criminal, 77 f.; Norwegian criminal code, 106, 107; extent of codification in modern, 125; Commissioners' notes on Ger. Civ. Code, 131; theory of liability in Code Napoléon, 155; Character of the Code Civil in the conflict of interests, 462 f.; usurious and oppressive contracts annulled in German Civil Code, 466; French and German, compared, 467 f., 470; certificate of inheritance in German Civil Code, 470; dotal régime in France, 470 f.; rule of equal division of estates in case of intestacy in continental, 550 f.
Codex Rationum, 423 f.
Codicellus Originalis, 388.
Codification, problem of extent of, 125.
Coemptio, 48.
Cogordon, on double nationality, 189.
Coke, value of his historical writing, 10; 275; 291, 293, 323; 401.
Cole, Adat law, 60.
Colonial Laws Validity Act, 338, 345.
Comines, Phillipe de, 319 f.
Comitia Centuriata, 266.
Comitia Tributa, 266.
Comity, 202 f.; 221 f.
Command of a Superior, as a defense in Chinese criminal law, 82.
Commentators, 276.
Common Law, origin of, 18; compared with French administrative law, 63 f.
Commonwealth, definition of, 304.
Comparative Law, 41 f.
"Compensation for Losses of War," by *Léon Duguit*, 357 f.
Confarreatio, 48.
Conflict of Interests, 461 f.; the order of protection, is family, credit, and property, 472.
Conflict of Laws, 199 f.; Huber's "de conflictu legum," 199 f.; Story, 199, 211; Lainé, 199 f.; d'Argentré, 201 f.; Bartolus, 205; Dumoulin, 208; Voet (John), 201 f.; Voet (Paul), 201 f.; comity, 202, 203, 221; status and capacity, 202 f.; capacity to dispose of immovables, 204; by will, 205; movables, 207; contracts, 208; marriage, 209; effect of marriage on property, 210 f.; marriage settlements, 212; intestate succession, 212; wills, 213 f.; procedure, 214; foreign judgments, 215 f.; international jurisdiction in civil matters, 214; criminal law, 216; English courts accepted doctrines of Dutch school, 217 f.
Congress for Historical Studies, 265.
Conrad the Salic, 276.
Conscription, in Roman military law, 374 f.
Conseil d' État, 69, 72.
Consideration, unknown in Indonesian law, 59; in equity, 435 f.;

common law, 436 f., 444 f.; natural love and affection, 436, 439; several senses in equity, 439; "meritorious," 444; doctrine of, a common law idea, 455; Lord Mansfield's influence on legal theory of, 455; quid pro quo in debt, 525; in assumpsit, 525.
"Consideration in Equity" by *Roscoe Pound*, 435 f.
Constitutional Law, English, 287 f.; Canadian, 324 f.; American and Canadian, compared, 324.
CONTI, UGO, "The Concept of Punishment," 92; biographic note, 92.
Contract, conflicts of law concerning, 208; voluntary, 436; express trust analytically same as, 437 f.; "real," 437, 451, 454; common law, 437; in equity, 441; what is, question of common law, 447; common law of, not settled until 19th century, 448 f.; casuist doctrine, 451; equity doctrine of enforceable promises based on natural justice, 459; usurious and oppressive, annulled by German Civil Code, 466; mutual assent in the formation of, 525 f.; objective and subjective tests of, 525 f.; estoppel theory in the creation of, 528 f.; parol evidence rule supports subjective theory, 529; quasi-contract theory where equity acts, 534 f.
Conveyances, defective, 436, 443 f., 446; under mistake of fact, 534 f.
Co-operative System, will follow present epoch, 26; 33 f.
Corpus Juris Canonici, 46.
COSTIGAN, GEORGE P., Jr., "Has there Been Judicial Legislation in the Interpretation and Application of the 'upon Consideration of Marriage' and Other Contract Clauses of the Statute of Frauds?", 473 f.; biographic note, 473; 559.
Cottenham, Lord, on non-enforcability of voluntary contracts, 436.
Council of Trent, 49, 50, 57.
Council of Trullo, 47.
Courtney, political theory, 288.
Courts of Request, 407.
Covenant, to hold land in trust, 436; classes of, 437; to stand seized, 438.
Coventry, 401.
Cranmer, 313.
Credit, conflict of, with ownership, 467 f.
Creditor, the, favored in primitive times, 462.
Crimes, Chinese classifications, 91; early confusion of, with torts, 103; kinds of, 108 f.
Criminal Law, 77 f.; interpretation (China), 79; time limitation (China), 79; limitation of place (China), 80; definitions (China), 81; computation of time (China), 82; remission of punishment (China), 82; attempt (China), 83; participants (China), 84; punishments (China), 84; recidive (China), 85; concurrence of offenses (China), 85; judicial discretion (China), 87; increase and reduction of punishments (China), 88; postponement of punishment (China), 89; conditional release (China), 89; prescription (China), 89; and punishment, 92 f.; theories of, 94; basis of, 94 f.; anthropological school, 88; positivists, 99; neo-classicists, 99; indeterminate sentence, 105 f.; conflicts of law, 216.
Criminology, 77 f.
Crosbie v. *McDoual* (13 Ves. 148), 441.
Cuius est Solum Eius est usque ad Cœlum, 151.
Cujas, 278; 414.
Cultural Tradition, current of, 266, 271, 278, 280.
Cumulative Penalty, principle of, 86.
Cushing v. *Dupuy* (5 A. C. 409), 334.

D

DALLOZ, 469.
Damages, fault, risk, and apportionment of loss, 155 f.; caused by war, 158, 358 f.
Darwin, 42, 46.
Debtor, harshness of early law against, 462.
"De Cive" (Hobbes), p. 82.
Declaration of Independence, origin in Canon law, 271.
"De Laudibus" (Fortescue), 278; 290.
Delegation of Legislative Power, 144 f.
Delegatus non potest delegare, 337.
Delitto colposo, 103.
Delitto doloso, 103.
Del Vecchio, 33.
Demolombe, 469.
DEMOGUE, RENÉ, 33; "Fault, Risk, and Apportionment of Loss in Responsibility," 155 f.; biographic note, 155.
Derecho, 30.
"De Republica Anglorum," 302 f.; 306.
Descriptio, 385.

Deuteronomy, 278.
Dicey, political theory, 288.
Dickens, 17.
Dickinson v. *Holcroft* (3 Keb. 148), 487 f.
Digna Vox, 256, 267, 274, 277, 280.
Diodorus Siculus, 293.
Diritto, 30.
Discretion, mechanical uniformity cannot exclude, 6; judicial regarding punishments (China), 87; legislative, 138 f.
Distribution, canon and common law of, compared, 136.
Divorce, 42, 44, 47, 48 f.
"Doctor and Student," 298 f., 311; on promises binding in conscience, 452 f., 458.
Documentum, 385.
Doherty, Minister of Justice, report of, 330.
Domicile, interconnection of nationality, 187 f.; as a test of nationality, 191 f.; admitted in Sweden and Holland, 194, 196 f.; easily lost in theory, 198; effect of, on status and capacity, 203.
"Dominion and Provincial Powers under the British North America Act, 1867," by *Angus J. McGillivray*, 324 f.
Dominium, 295.
Dominium Politicum, 293 f.
Dominium Regale, 293 f.
Donation of Constantine, 292.
Dotal Régime, 470 f.
Droit, 30.
Dudley, Edmund, "Tree of Commonwealth," 310.
Due Process of Law, 139.
DUGUIT, LÉON, 33; denies sovereignty of the state, 64, 65; on patrimonial and imperial concepts of sovereignty, 251; 283; "Compensation for Losses of War," 257 f.; biographic note, 357.
Dumoulin, 208 f.
Durkheim, 46.

E

"Ecclesiastical Polity" (Hooker), 313.
Economics, relation of to legislation, 115 f.; not a part of jurisprudence, 128.
Egerton, 401.
Edgeworth, Miss, 154.
Edictum Pistense, 269.
Education, "Essentials of a Modern Legal," by *John Bradley Winslow*, 113 f.; as a proposed test of nationality, 191 f., admitted in Russia, 193.
Ehrlich, on the legatory character of the earliest will, 543; on the living law, 557.
Eliot, Sir John, 256, 258.
Elmira Reformatory, 105.
Elyot, "Gouvernour," 310 f.
Encyclopedia, a department of German legal literature, 32, 33.
Endogamy, 43, 44.
"English Law and the Renaissance" (Maitland), 305, 311.
Enos v. *Buckley* (94 Ill. 458), 572, 574 f., 578 f.
Equitable Owner, 437 f.
Equity, consideration in, 435 f.; discordance of law and, 438, 447; jurisdiction of, to rescind contracts, 532 f.
Erskine, Lord, 441.
Estoppel, many meanings of, 459; theory of, in the creation of contracts, 528 f.
Exogamy, 43, 44.
Extranea Persona, 421.

F

Factory Acts, John Bright and the, 12; 19.
Fait Personnel, 72, 73, 74.
"Fallacies, Lay in the law" (*Pollock*), 5.
Fa Lü Pien Hui, 79.
Family, the unit of Chinese society, 91.
Family Law, social interest prevails in, 36.
Family Settlements, importance of in England, 554 f.
Farewell, The (7 Ont. 380), 343.
"Fault, Risk, and Apportionment of Loss in Responsibility" by *René Demogue*, 155 f.; degrees, 159.
Faute Lourde, 73, 74.
Ferry v. *Stephens* (66 N. Y. 321), 439.
Fichte, 26.
Ficti Possessores, 419.
Field v. *Peeples* (180 Ill. 376), 574, 576 f.
Finch, Sir Heneage, 401; inaugurator of the Statute of Frauds, 475.
Fleet, marriages, 42, 51 f.
Fleming, 401.
Florentine MS., 419.
Florentinus, 270.
Foelix, 220.
Foreign Law, effect of, on social conduct, 13.
Formality, in legislation, 131, 132 f.; object of, 550.
Fortescue, 275, 278; political theory, 288; works and theory, 290 f.; 304, 315, 323.

Fouillée, 28.
Fourteenth Amendment, 139.
Fragmentum Pragense, 272.
Frampton v. *Gerrard* (2 Rolle Abr. 785), 457.
France, legal philosophy in, 27, 29, 33.
Franco-Prussian War, French legislation concerning losses caused by, 360.
Fraser, Lord, 49, 50.
Fraus Creditorum, 430, 432.
Freedom of Contract, régime of, passing, 21.
Freeman, political theory, 288.
French Administrative Courts, 63f.
French Civil Law, Conflict of Interests Legally Protected in, by *Joseph Charmont*, 461 f.; Character of the Code Civil, 462 f.; dotal régime in, 470 f.
French Revolution, a bourgeosie movement, 250; seeds of, traceable before Richelieu, 295; 323; legislation of, concerning war losses, 359 f.; individualist system of labor prior to, 464.
FREUND, ERNST, "Prolegomena to a Science of Legislation," 122 f.; biographic note, 122.
Froland, 220.
Fursaker v. *Robinson* (Prec. Ch. 175), 457.
Fustuarium, 378.

G

GAIRETHINX, 540.
Gaius, 266; 429.
Gascoigne, "Theological Dictionary," 310.
Gebôcian, 389, 390.
General Theory of Law, one of the departments of German legal literature, 32.
Generalization, is falsification, 243, 249, 252 f.
German, Christopher, St., 298 f., 318, 323.
German Civil Code, 14; commissioners' notes on, 131; usurious and oppressive contracts annulled by, 466; compared with French, 467 f., 470; certificate of inheritance in, 470; on the compulsory portion, 551.
Germany, legal philosophy of, 27, 29; 255 (n).
Gerson, 301.
Gesetz, 30.
Gide, 369.
Gierke, 284.
Gift, executory, 436, 439 f.; parol, 436, 440 f.; of a debt, 439 f.
Glanville, 267, 274.
Gloria, Cod. Dipl., 387.
Glossators, 272.
Gortyn, will unknown in the laws of, 539 f.
GOUDY, HENRY, "Legal Possession—Two Maxims," 151 f.; biographic note, 151.
"Governance of England" (Fortescue), 290 f.; 304.
Gratian, 274.
Gratuitous Promises, 439 f.
Great Britain, attitude toward double nationality, 189 f.
Greek, origin of documents, 387.
Gregory the Great, 268, 270.
Gregory VII, 271.
Gregory IX, 272.
Gretna Green, 41, 42, 49, 53, 54.
Grispigni, 99.
Grondvoogd, 59.
Grotius, on war loss indemnification, 359; basis of the will in natural law, 536 f.

H

HAGUE CONVENTION, 358.
Haldane, Lord, 539.
Hales, John, "Discourse of the Common Weal," 311.
Hall, international rules can not be abrogated by single states, 195.
Hallam, political theory, 288.
Hamilton, etc., R. v. *Atty. Gen. for Ont.* ([1916] A. C. 583), 350.
Handfasting, 49, 55.
Harcourt, Sir William Vernon, 539.
Hardham v. *Roberts* (1 Vern. 132), 458.
Hardwicke, Lord, 53.
Hariou, 70.
Harlan, Justice, 255.
Harrington, philosopher of Puritan revolution, 246 f.; 323.
Harris v. *Davies* (10 A. C. 270), 341.
Harrison, Prof., 220.
Harrison, "Description of England," 312.
Harrison v. *People* (50 N. Y. 518), 177.
HASTINGS, WILLIAM G., "Montesquieu and Anglo-American Institutions," 243 f.; biographic note, 243.
Heath, 401.
Hegel, 32, 33; imperialistic development of Rousseau, 252; 256, 282, 284; bases the will on the family, 537.
Heir, creation of "real" rights by ostensible, in French law, 468 f.
Heneage, 401.
Henley, Lord, 446.

Hereditas Jacens, 547.
Hill-Tout, Charles, 46.
Hincmar, 269.
Hippocrates, 13.
Hobart, 401.
Hobbes, 256, 258, 262, 281 f., 315, 323.
Hodge v. *Queen* (9 A. C. 117), 336, 341.
Hodgin, "Dominion and Provincial Legislation," 339.
HOLDSWORTH, W. S., statement of, criticized, 386; "Early History of the Attorney and Solicitor General," 394 f.; 548.
Holman v. *Green* (6 Can. S. C. 707), 348.
Holmes, Justice, doctrine of sovereignty criticized, 255 f.
Hooker, political theory, 270; 288, 301; 313 f., 323.
Horace, 9 f.
Hsiu Ting Fa Lü Kuan, 78.
Huber, Ulrich, on "de conflictu legum," 199 f.; biographic note, 199; article on, by *Ernest G. Lorenzen*, 199 f.; text and translation of his treatise, 225 f.
Hübner, on early Germanic law of inheritance, 540.
Hugolinus, 273.
Humanist Movement, revival of study of Roman law, 455.
Husband, favored in the Code Civil, 462 f.
HUVELIN, PAUL, "A Text of Q. Cervidius Scaevola on Sales Made through the Agency of Bankers," 412 f.; biographic note, 412.

I

ILBERT, SIR COURTENAY, 138.
Illinois Married Woman's Act (1861), 569.
Illusory Appointment Act (Eng.), 126.
Imminent Danger, as a defense in Chinese criminal law, 82.
Immovables, capacity to dispose of, 204, 207.
Imperium, 295.
Impossibility, in criminal attempt (China), 83.
Indeterminate Sentence, 105 f.
India, wills unknown in, 540.
Individualism, movement toward, after French Revolution, 25; definition, 25; transition to solidarity, 33 f.; disappearance of, 35 f.; of Roman law unknown in Indonesia, 60; in the theory of liability, 156.
"Indonesian Customary Law," by *C. Van Vollenhoven*, 58 f.
Idulgences, sale of, 46, 50.
Industrial Courts, 19 f.
Industrial Law, 19 f.
Infants' Relief Act (Eng.), 126.
Infirmity, as a defense in Chinese criminal law, 82.
Inheritance, certificate of, in German Civil Code, 470; taxes, 561 f.
Inns of Court, 405.
In Pari Causa Possessor Potior Haberi Debet, 152.
Inquisitorial procedure of Chancery, 16.
Insanity, effect of, in Chinese criminal law, 82.
Insurance, liability, 162, 167.
Interests, conflict of, 461.
International Administrative Law, 34.
International Commercial Law, 34.
International Congress of Historians, 151.
International Law, nature of, 19; has overlapped private law, 34; public, 187 f.; nationality and domicile, 187 f.; does not submit to Procrustean treatment, 194 f.; private, 199 f.; Huber's "de conflictu legum," 199 f.; international jurisdiction in civil matters, 214.
International Law of Labor, 34.
International Marriage Law, curiosities of, 41 f.
"Interconnection of Nationality and Domicile," by *Th. Baty*, 187 f.
Interdictum Fraudatorium, 430, 432.
Interstate Commerce Act, 145.
Intestate Succession, conflicts of law concerning, 212; older than testamentary disposal, 541; exceptional in England, usual in France, 555.
Intoxication, effect of, in Chinese criminal law, 82.
Irnerius, 272 f.
Isidore, St., 269 f., 273.
Italian Charters, 385 f.
Italy, philosophy of law in, 33.
Iudicium, distinguished from ius, 429.
Iurisdictio, of the praetor, 428 f.
Ius, 30; distinguished from iudicium, 429.
Ius Administrationis, 414 f., 432 f.
Ius Gentium, 278.
Ivo of Chartres, 273.

J

Jarndyce v. *Jarndyce*, 17.
Jeffreys v. *Jeffreys* (Cr. & P. 138), 436.
Jellinek, 284.
Jenks, Edward, 60; on proportion of judge-made law, 68; 480.

Jerome, St., 268.
Jewish Law, wills unknown in older, 540.
John Deere Plow Co. v. *Wharton* ([1915] A. C. 330), 351.
John of Salisbury, 273 f.
John of Waltham, 556.
Johnson, Samuel, attack on primogeniture, 548; 557.
Jones v. *Guaranty Co.* (101 U. S. 626), 507.
Josepha Segunda (10 Wheat. 312), 179.
Jostice et Plet, 273.
Jucundus, L. Caecilius, tablets of, 421.
Judge-Made Law, advantage over legislation, 125.
Judicial Action, acts on past state of facts, 260.
Juridical Conscience, the basis of Anglo-Saxon Justice, 30; true source of juridical principles, 38.
Jurisprudence, a department of English legal literature, 33; legislative and judicial, 122; field of, 123, 129, 149; province of legislature, 127, 128, 129; and political science, 146 f. *See* "ANALYTICAL JURISPRUDENCE."
Juristic Encyclopedia, 32.
Justice, ancient definition of, 6; hyperbolic language of orators and textwriters on, 6; distinction between natural and conventional, 11; substitution of, for force, the goal of social evolution, 18; segregation of policy from, in legislative science, 138; function of courts of, 257; postulates jural freedom, 259; governed by precedent rule, 261; as equality, 270.
Justinian, 267 f., 276.
Juvenile offenders, 108.

K

KALES, ALBERT M., "Adverse Possession against Reversioners and Remaindermen," 564 f.; biographic note, 564.
Kant, 26; 32, 33; 252 f.
Kemble, Codex of, 385, 386, 387, 389, 390, 391, 392.
Kerndorpers, 59.
Kitaks, 58.
Kniep, 428.
Kohler, Joseph, criticized, 59.
Knox, "Monstrous Regiment of Women," 311.
Kultur, 28.

L

LABBÉ, 472.
La Compagnie Hydraulique, etc., v. *Continental H. & L. Co.* ([1909] A. C. 194), 328.
Lainé, 199 f.
Lamar, Justice, 257.
Lamb, Charles, 12.
Landbôc, 388, 389, 390.
Lang, Andrew, 45, 46.
Larnaude, 364.
Lasson, on the will, 538.
"Latest Phase in Legal Evolution," by *W. Jethro Brown*, 18 f.
Latins, legal philosophy of, 27, 29.
Law, not a general guide for conduct, 6; natural, 8; not a system of precepts, 10; necessity of legal rules, 10; effect of foreign, on moral standards, 13; not arbitrary, 14; expresses the common conscience, 15; exaggeration of criminal, by the public, 15; fallacy that its object is to discover truth, 15 f.; origin of common, 18; nature of international, 19; industrial, 19 f.; philosophy of, 25 f.; three schools of philosophy of, 26 f.; Pan-American school of international, 27; idea of, has been constantly changing, 29; dissimilarity of the idea of, in different countries, 29; difference of conception of, shown in legal terminology, 30; meaning of, 30; concept of, as basis of legal philosophy, 32; private, partly internationalized, 34; the social interest in private, 36; development of administrative, 36; economic influences on civil, 36; private, for war, 36; concept of solidarity the object of, 38 f.; comparative, 41 f.; curiosities of international marriage, 41 f.; Indonesian customary, 58 f.; individualism of Roman, unknown in Indonesia, 60; modern French, on responsibility of the state for faults of officials, 63 f.; is the creation of judges, 67 f.; revision of Chinese criminal, 77 f.; criminal, and punishment, 92 f.; science of legislation, 122 f.; administrative, 144 f., 146 f.; two maxims of legal possession, 151 f.; fault, risk, and apportionment of loss in responsibility, 155 f.; Huber's "de conflictu legum," 199 f.; a legal heresy, 255 f; custom abrogates Roman, 272; constitutional, 287 f.; beginnings of English constitutional, 287 f.; sources of (St. German), 299; Canadian constitutional, 324 f.;

the modernness of Roman military, 373 f.; legal history, 384 f.; Anglo-Saxon legal documents, 384 f.; early history of the attorney and solicitor general, 394 f.; a text of Roman law on sales by bankers, 412 f.; consideration in equity, 435 f.; private, 435 f.; analytical theory of, 448; conflict of interests legally protected in French civil, 461 f.; mutual assent in the formation of contracts, 525 f.; modern limitations on the liberty of testation, 536 f.; adverse possession against reversioners and remaindermen, 564 f.

Law Merchant, origin of, 12.

Law Schools, 113; abstract science of law, in, 122.

Lawyers, training of, 113 f.; business of in England and America is litigation and not legislation, 130.

"Lay Fallacies in the Law," by *Sir Frederick Pollock*, 5 f.

Lefroy, "Canada's Federal System," 329, 336, 343.

Legal Documents, Anglo-Saxon, 384 f.

Legal Education, 113 f.; necessity of study of history and philosophy of law, 114 f.

Legality, as a defense in Chinese criminal law, 82.

Legal History, 384 f.; Anglo-Saxon documents of the 8th and 9th cc., 384 f.; early history of the attorney and solicitor general, 394 f.; a text of Q. Cervidius Scaevola on sales made through the agency of bankers, 412 f.; of the Statute of Frauds, 473 f.; of the power of testation, 536 f.

Legal Philosophy, English school of, 14; new conception and new bases of, 25 f.; three schools of, 26 f.; need of renovation in, 28; dependence on the concept of law, 32; different approaches to, in different countries, 32, 33; false premises of older, 37; future of, 38 f.; importance of, in legal education, 114 f., 120; German, 255 (n); need of, in Anglo-American law, 460; of power of testation, 537 f.

Legge, 30.

Légitime, in English law, 550; in continental law, 550 f.; substitute for in American statute law, 560 f.

Legislation, "Prolegomena to a Science of," by *Ernst Freund*, 122 f.; segregation of justice and, 124; processes of, 125; advantage of judge-made law over, 125; shortcomings of English and American, 126; specific province of, 127; relation of economics to, 115 f., 128; must take data from non-legal expert, 130; does not state reasons, 131; principles of, contrasted with judicial reasoning, 131; forms, terms, and remedial provisions, 132; function of stabilization, 135; treatment of remedial and validating provisions, 136 f.; segregation of justice and policy, 138.; policy, discretion, and methods of control, 138 f.; delegation of power of, 144 f.; relation of, to jurisprudence, 149 f.; acts for the future, 260; seat of power of, in Rome, 266 f.; regarding compensation for losses of war, 357 f.; function of, in contrast to adjudication, in conflict of interests, 461 f.; judicial, in the interpretation and application of the Statute of Frauds, 473 f.; methods of interpretation, 509 f.; on the law of succession, 536 f.

Legislation Reference Bureaus, 127.

Leibnitz, 283; connects the will with immortality of the soul, 536.

Lenel, on the origin of wills, 543.

Le Play, on enforced partition of family property, 552.

Lesion, 462.

"Leviathan" (Hobbes), 281 f.

Lex, as willed design, 7; 30.

Lex Domicilii, 203 f.

Lex de imperio Vespasiani, 267.

Lex loci actus, 204 f.

Lex loci celebrationis, 209 f.

Lex Metalli Vipascensis, 420.

Lex rei sitae, 205 f.

Ley, 30.

Liability, fault, risk, and apportionment of loss, 155 f.; economic aspect of, 159 f.; theory of, 163; classical theory of, 167; compensation for war losses, 357 f.; basis of the state's, for losses of war, 362 f.; of personal representatives on leases, 515 f.; of representatives as assigns of leases, 519 f.

Libellus, 385, 391.

Liber, in sense of formal document, 384 f.

Liber Antiquus, 388.

Liber Rationum, 423.

Liberty, changing ideas of, 37; régime of absolute, prior to French Revolution, 464.

"Liberty of Testation and some Modern Limitations thereon," by *Orrin K. McMurray*, 53 f.
Libri Feudorum, 152.
Lieber, decision of, on enforced naturalization, 188.
Limited Aggravation, principle of, in criminal law, 86.
Liquidators of Bankers v. *Receiver, etc., of New Brunswick* ([1892] A. C. 437), 328.
Littleton, 401.
Livy, on war, 383.
Locatio, 462.
Locke, philosopher of Whig revolution, 246 f.; 283; classical theory of the constitution, 287; 315, 323.
Locus regit actum, 205.
Loi, 30.
LORENZEN, ERNEST G., "Huber's De Conflictu Legum," 199 f.; biographic note, 199.
Low, political theory, 288.
Lucretius, 271.
L' Union St. Jacques, etc. v. *Belisle* ([1874] L. R., 6 P. C. 31), 332.
Luwaran, 59.

Mc

McCULLOCH, defense of primogeniture, 548.
McGILLIVRAY, ANGUS J., "Dominion and Provincial Powers Under the British North America Act, 1867," 324 f.; biographic note, 324.
McKechnie, Dr., 292.
MacLennan. 42, 43, 46.
McMURRAY, ORRIN K., "Liberty of Testation and Some Modern Limitations thereon," 536 f.

M

MACHIEVELLI, 274; 292, 315.
MacKintosh, aphorism of, that constitutions grow, 305.
Madison, James, translation of Montesquieu, 249.
Madison v. *Alderson* (8 App. Cas. 467), 443.
Magna Charta, 274; 292; 346.
Magyars, adoption as a substitute for the will among the early, 541.
Maine, Sir Henry S., 244; on the will, 536, 543 f.; 556.
Maitland, political theory, 288; 302 f., 305 f.; 483; criticism of primogeniture, 553; criticized, 555.
Malecka, Case of, 189.
Mansfield, Lord, judgment in *Somerset's* case, 247; different kinds of law, 266, came at end of natural law period, 454; influence of, on theory of consideration at law, 455.
Mariana, 281.
Marriage, curiosities of international law of, 41 f.; Bishop, law of, 42; primitive, 42; Darwin, Avebury, MacLennan, on primitive, 42; Christian, 42, 46; history of primitive, 43 f.; Roman law of, 46, 48, 49; Scottish "habit and repute," 48; Roman church, 50, 55 f.; English and Scots law compared, 50; conflicts of law concerning, 209 f.; lex loci celebrationis, 209 f.; effect of, on property, 210 f.
Marriage Settlements, conflicts of law concerning, 212. *See* "FAMILY SETTLEMENTS.
Marsiglio of Padua, 291.
Marx, Karl, 251.
Mascardi, 152.
Master, favored in the Code Civil, 462 f.
Master and Servant, French legislation concerning, 463 f.
Matthews, Stanley, 259.
Maxwell, Sir Peter Benson, on the "Interpretation of Statutes," 500.
Meili, 218, 225.
Merger, principle of, in criminal law, 86.
Metaphysics, in legal philosophy, 33.
Military Courts, in Rome, 377 f.
Military Operations, compensation for losses by, 358 f.
Military Service, qualifications for and exemptions, in Roman, 375 f.; punishments for avoiding Roman, 376.
Miller, Justice, 257.
Mirabeau, on the will, 537.
Miraglia, 33.
Missouri v. *Illinois*, 200 U. S. 496, 277.
Mobilia ossibus inhaerunt, 207.
Mobilia personam sequuntur, 207.
Molina, 281.
Mommsen, 280; 419.
"Monarchia" (Fortescue), 290.
Montesquieu, 26; theory of separation of powers, 69, 243; "and Anglo-American Institutions," by *William G. Hastings*, 243 f.; "Esprit des Lois," 244 f.; "Persian Letters," 247; 283; 305, 308.
Montreal v. *Montreal St. R.* ([1912] A. C. 383), 351.
Morals, and law, 7; office of judge confounded with moralist's, 11; law cannot embrace all of, 11; ethical feeling not uniform in com-

plex communities, 11; Quaker and Anglican, compared, 11 f.; of the legal profession, how guarded, 13; effect of foreign law on standards of, 13.
Morang v. *Pub. Syndicate* (32 Ont. 393), 343.
Moratorium, 463.
More (Sir Thomas), 298.
Mormans, 45.
Movables, conflicts of law concerning, 207 f.
"Mutual Assent in the Formation of Contracts," by *Samuel Williston*, 525 f.

N

NAPOLEON, on enforced equality in successions, 553.
Narratores pro Rege, 395.
Nationality, interconnection of domicile, 187 f.; problems of double, 189; Westlake's theory of double, 189; Weiss, 189 f.; Cogordan, 189 f.; Russia, 189; Costa Rica, 189; Earl of Malmesbury on protection of nationals, 189; education as a proposed test of, 191 f.: admitted in Russia, 193; domicile as a test of, 191 f.: admitted in Sweden and Holland, 194. *See* NATURALIZATION.
Natural Law, a branch of divine law, 8; influence of, 29; philosophy of law derived from in Germany, 32; renascence of. in France, 33; influence of in 17th century on common law, 449; basis of the testament in, 536 f.
Naturalization, automatic, in South America, 187 f.; in Peru, Mexico, and Venezuela, 188; decision of Lieber on enforced, 188; Olney on enforced, 188; Blaine on enforced, 188; enforced in Uruguay and in Venezuela, 189. *See* NATIONALITY.
Negotiorum gestor, 414 f., 421 f.; 426, 432.
Nelson v. *Davidson* (160 Ill. 254), 574 f., 578, 582.
Nemo suo statuto ligatur, 256, 258.
Neo-Classical School, in criminology, 99.
"New Conception and New Bases of Legal Philosophy," by *Alejandro Alvarez*, 25 f.
Nexum, 450.
North. Francis, 401, 402; 561.
Norwegian Criminal Code, draft, 106; 107.
Noy, 401.
Nudum Pactum, 451, 457, 459.
Nullity, of declaratory or executory acts, 134 f.

O

OBJECTIVE TEST OF CONTRACT RELATION, 525 f.; 532 f.
O'Brien v. *Boland* (166 Mass. 481), 444, 445.
Offer, irrevocable, 446; continuing, 526; mailing acceptance completes contract, 526: even though a revocation is in transit, 528; effect of, when made through intermediary, 529 f.; death terminates, 531; liability of a lunatic, 532.
Officium Virile, 415.
Olney, admission of law of enforced naturalization. 188.
Onslow, Richard, 401.
Options, under seal, 436, 444 f.
Ownership, conflict of, with credit, 467 f.

P

PACTS, actionable, 451.
Pactum de non Petendo, 432.
Pactum Donationis, 442
Pagina, 385.
Pan-American, school of international law, 27.
"Pandectes du droit Français," 280.
Parliamentary Bar, 310.
Parol Evidence Rule as a rule of substantive law, 529; application of in equity, 533 f.
Parsons, on consideration in equity, 443.
Partnership Act, 68.
Pascal, 461.
Paulus, 151.
Pedis Possessio, 175.
Permissive Rights, 185.
"Personal Representatives, Liability of, on Leases," by *John R. Rood*, 515 f.; as assignees, 519 f.
Personality, principle of, in Germanic law, 200.
Petition of Right, 281.
Petri Exceptiones, 272.
Pflichtteil, 551.
Philippines, customary law in, 58 f., 60, 61.
Phillipe of Valois, will of, 279.
Philosophy of Law, place in legal education, 114 f.; need of in the Anglo-American system, 460. *See* "LEGAL PHILOSOPHY."
Philpot v. *Wallet* (Skin. 24), 488.
Pillius, 273.
Place, criminal law (China) with reference to, 80 f.; three exceptions, 81; as a criterion of nationality, 187 f., 192.

Placentinus, 272.
Plato, criticized the will but left one, 537.
Plummer, political theory, 290 f.; 293 f.; 297.
Poincaré, 464.
Pole, Reginald, 306.
Policraticus, 274.
Police Power, 144; as based on preponderant opinion, 262.
Policy, legislative, 138.
Political Development, part of, from order to reform, 289.
Political Science, relation of, to jurisprudence, 146 f.; evils of arbitrary government, 261; divine right of kings, 262.
Pollexfen, 403.
POLLOCK, SIR FREDERICK, "Lay Fallacies in the Law," 5; biographic note, 5 f.; description of family settlements, 554.
Polygamy, 44, 46.
Popham, 401.
Positivists, in criminology, 99.
Possession, "Two Maxims," by *Henry Goudy*, 151 f.; essay on by *Henry T. Terry*, 170 f.; nature of, 170; corporeal and incorporeal, 170; actual and constructive, 170 f.; adverse, 172; actual, 173 f.; animus possidendi, 172, 177 animus domini, 172, 178, 181; constructive, 181 f.; of movables in good faith as good as title in French law, 468.
Possessory Rights, 186.
Post Obit Transfers, limited to acquisitions of the grantor, 541; the adoption system shaded into, 542; 544.
Pothier, "Pandectae Justinianeae," 430.
POUND, ROSCOE, "Consideration in Equity," 435 f.; biographic note, 435; on the object of forms, 550.
Powell v. *Apollo Candle Co.* (10 A. C. 282), 342.
Praeco, 425.
Precedent, advantage and defects of system of, 120.
Preparatory Acts, in criminal attempt (China), 83.
Prescription, in Chinese draft criminal code, 89 f.; comparative criminal law of, 89 f.
Prescription Act (Eng.), 126.
Primogeniture, extended to collateral lines, 546; male, 548; 557; abandoned in early legislation of Massachusetts, 558.
Princeps legibus solutus est, 267, 279.
Principles, legislative and judicial formulation of, contrasted, 122 f.; and conventional regulations, 125; cannot deal with measured quantities, 127; cannot produce form, 128; legislative and common law, contrasted, 131. *See* "LEGISLATION."
Private Law, economic influences on, 36; for war, 36.
Property, theory of absolute right of, 369.
Proprietor, favored in the Code Civil, 462. *See* "FRENCH CIVIL LAW."
Protected Rights, 185.
Provisional Criminal Code (China), 79.
Public Law, 243 f.; theory, 243 f.; Montesquieu and Anglo-American Institutions, 243 f.; legal rights against the sovereign, 256 f.; constitutional law, 287 f.; beginnings of English constitutional law, 287 f.; fifteenth century period, 289 f.; administrative, 357 f.; compensation for war losses, 357 f.; military law, 373 f.
Public Opinion, the basis of judicial principles, 38; as a foundation of legal philosophy (q. v.), 39.
Pufendorf, the will as a creation of positive law, 536, 538 f.
Punishment, 77 f.; remission (China), 82; in Chinese Criminal Code, 84; increase and reduction of (China), 88; postponement of (China), 89; concept of (Conti), 92 f.; complement of, 93, 98, 104, 106, 112; theories of, 94; purpose of, 96 f.; theory of reform given up, 100; penal proportion, 109 f.; modern views, 116; military, in Rome, 377 f. *See* "CRIMINAL LAW."
Pupilla, 415, 432.
Puritan, influence on marriage, 50, 51.

Q

Queen v. *Marais* ([1902] A. C. 51), 345.
Querela Testamenti Inofficiosi, 559.
Questio, classic jurists adhered closely to, 416 f.
Quia Emptores, statute of, 508.
Quod principi placuit, 266.

R

Race, as a criterion of nationality, 187 f., 192; doctrine of indelible, accepted in France and Spain, 187.
RANDALL, H. J., "Beginnings of English Constitutional Theory," 287 f.

Recht, 30.
Recidive, in Chinese Criminal Code, 85; 99.
Reed, 60.
Reeve v. *Jennings* ([1910] 2 K. B. 522), 501 f., 504, 506.
Referendum, 146.
Reform Act of 1932, 287.
Reformation, The, 279.
Reformation, specific performance under guise of, denied, 443.
Regesto di Farfa, 386.
Regia, 266.
Regii Neapol, Arch., 386.
Regina v. *Brierly* (14 Ont. 531), 343.
Regina v. *Burah* (3 A. C. 889), 342.
Reichel, 50.
"Relation of England, The," 320.
Release, conditional, in Chinese draft criminal code, 89.
Remedial and Validating Legislation, 136 f.
Renaissance, 279, 291 f., 294, 303; English law and the, 305; 315.
Renouvier, 28.
Replacement, of property damaged by war, 367 f.
Responsa, practice of classic jurists as to, 416 f.
Responsibility, "of the State for Faults of its Officials," by *Frederick P. Walton*, 63 f.; in French administrative law, 63 f.; cumulative, 71; fault, risk, and opportionment of loss, 155 f.; theory of, 163; classical theory of, 167; basis of, of the state for losses of war, 362 f.; workman's compensation legislation in France, 467.
"Revision of the Chinese Criminal Code," by *Chung-Hui Wang*, 77 f.
Revocation, of offer, ineffective until received, 527.
Riccobono, 422.
Riel v. *Queen* (10 A. C. 675), 342.
Rights, permissive and protected, 185; possessory, 186; of possession, 186.
Risque Créé, 69.
Rocco, 98, 99, 100.
Roger of Waltham, 293.
Rolin, Albéric, 219 f.
Roman Clergy, influence of, in introducing written documents, 384 f.; 387.
Rome, modernness of military law of, 373 f.; jurisprudence of, 373; evolved the modern concept of the will. 540; wills in, began with family law, 543; Plebean mancipatory will was the beginning of modern testaments, 543.
Roman Law, influence of, 29; legal maxims in, 151 f.; the moderness of, in military affairs, 373 f.; a text of on sales by bankers, 412 f.; categories of, accepted, 450; stage of strict law, 450; study of, as part of humanist movement, 455; no action on bare promise, 456; Stephen's criticisms of Institute and Digest, 460.
Roman Military Law, The Modernness of, *Charles P. Sherman*, 373 f.
ROOD. JOHN R., "Liability of Personal Representatives on Leases," 515 f.; biographic note, 515.
Rousseau, 26; 245, 250 f.
Routledge v. *Low* (L. R. 3 H. L. 100), 345.
Royal Commission on Naturalization, 189.
Russell v. *Queen* ([1882] A. C. 829), 335, 336.
Russell v. *Scott* (9 Cow. 279), 179.

S

SACHSENSPIEGEL, 276.
Saleeby, Najeeb M., 58.
Sale of Goods Act, Uniform, 68; 508.
Saleilles, 159.
Sande, John À, 208.
Sarakatas, 58.
Sarrut, 469.
Savigny, 278; analysis of legal transactions, 459.
Scaevola, Q. Cervidius, a text of, on sales made through the agency of bankers, by *Paul Huvelin*, 412 f.
Scedula, 385.
Scherer, 245, 248.
Schmid, on the landbôc, 388.
Scriptura, 385.
Seavey v. *Drake* (62 N. H. 393), 441, 443.
Seeley "Introduction to Political Science," 312.
Seizin, 171 f.; 566 f.
Self-Defense, in Chinese criminal law, 82.
Selborne, Lord, 443.
Selden, 323.
Seneca, the golden age, 271.
Serjeants, 395, 398 f.; 407 f.
Sermon on the Mount, 152.
Severin v. *Reg.* (2 S. C. R. 81), 338.
Sharington v. *Strotton* (Plowd. 298), 456.
SHERMAN, CHARLES P., "The Modernness of Roman Military Law, 373 f.
Shu Ching, 77.
Sidney, Algernon, 276; 323.
Simon de Montfort, 275.

"Six Livres de la République," 279.
Smith, Adam, "Wealth of Nations," 561.
Smith, A. L., Master of Balliol, 10.
Smith, Sir Thomas, 302 f.; 315, 319, 321 f.
Snouck Hurgronje. 58, 60, 62.
Social Evolution, substitution of justice for force, the goal of, 18.
Socialism, 21; most plans of, put risk of labor on the State, 466.
Social Sciences, methods in, 27.
Société d'Études Malgaches, 61.
Society of Friends, 12.
Society of Quakers, 54.
Sociological Jurists, 260. *See* "LEGAL PHILOSOPHY."
Sociology, function of, in legal education, 115 f.
Sohm, 467, 469.
Soldiers, pay, rewards, decorations, service, etc., of, in Rome, 379 f.
Solicitors, 394 f.
Solicitor General, 394 f., 399 f.; modern patent of, 410.
Solidarity, régime of, 33 f.; realization, the object of law, 38; theory of, in law of civil liability, 160 f.
Solazzi, 417 f., 430, 432.
"Some Curiosities of International marriage Law," by *J. W. Brodie-Innes,* 41 f.
Somers, 401, 403.
Somerset's Case, 247.
Sourdat, 68, 69.
Sovereignty, abnegation of absolute, 34; Duguit denies that State has, 64; acts of, 66. 70; limitations of, 256 f.; theory of Roman law contrary to absolutism, 267; prerogative of the king, 404 f.
Spondeo, 450.
Sponsio, 450.
Star Chamber, 407 f.
State, Prussian theory of, 14; increasing control of economic relations by, 21; new conception of, 36; responsibility of, for faults of its officials, 63 f.; German idea of, 64. 65; industrial sphere of, 65; liability of, 163.
Status and Capacity, in conflict of laws, 202 f.; disposition of immovables, 204; making a will disposing of movables, 205; as affecting movables, 207; contracts, 208; marriage, 209 f.
Statute of Frauds, English and German, compared, 131; 132; parol gifts not within, 440; 442; judicial legislation in the interpretation and application of, 473 f.; five groups of sections in, 474; history of, 475 f.; object of, 478 f.; not aimed at fraud and perjury, 490; three kinds of contracts to which "upon consideration of marriage" applies, 494 f.
Statute of Uses, 508.
Staunton, Sir George, 78.
Staunton, Justice, 255, 259.
Steffens, on Marxian socialism, 251.
Stephen, Sir James, on absence of general theories in Common law, 460; 460.
Stoppato, 107.
Story, reliance of, on Huber, 199; 211; 221; 336.
Strech v. *Parker* (1 Rolle Abr. 22), 487.
Stuart Kings, 409.
Stubbs, political theory, 288 f.; 297.
Suarez, 281.
Sub Hasta, inheritance, 418.
Subjective Test of contract relation, 525 f.; parol evidence rule supports, 529; 532 f.
Succession. *See* "WILLS."
Sugden, Sir Edward, 435.
Sully, Duc de, 280.
Suttee, 543.
Syngrapha, 385.

T

Table of Affinities, 47, 48, 56, 57.
Taboos, 45.
Ta Ching Lü Li, 78, 91.
Tacitus, 540.
Talleyrand, on the will, 537.
Tay v. *Slaughter* (Prec. Ch. 16), 458.
Taylor v. *Horde* (1 Burr 60), 565.
Taylor v. *Wheeler* (Salk. 449), 457.
Teissier, Georges, 70.
Telligraphum, 385, 389.
Territoriality, of laws, 200 f.
TERRY, HENRY T., essay on "Possession," 170 f.
Testamentum Calatis Comtiis, 541.
Testation, liberty of, and some modern limitations thereon, 536 f.
Thalheim, 425.
Thayer, James Bradley, 244; 477 f.; on the parol evidence rule, 529.
Theodorus, 384.
Theory and Philosophy of Law, 5 f.; absence of, in Anglo-American system, 460. *See* LEGAL PHILOSOPHY.
Thingatio, 543.
Thinx, 540.
Thomas, St., 293.
Thompson, Sir John, report as Minister of Justice, 339 f.
Thorpe, 390, 391.

Time, operation of, in Chinese Criminal Code, 79 f.; four solutions, 80; computation of (China), 82.
To Boclaune, 389.
Tocqueville, De, 245.
Totem, 45, 46.
Tractatus Repraesallarum, 277.
Träger, classification of, 80.
Treby, 403.
Trendelenburg, on the will, 538.
Trent, Council of, 49, 50, 57.
Tribonianism, 420.
Tribunal des Conflits, 69, 72.
Trotsky, 246.
Trullo, Council of, 47.
Trust, gratuitous declaration of, 436, 437 f.; covenant to hold land in, 436; constructive, 442; staple anology of the chancellor, 449.
Trustees, rigor of older chancery standards in duties of, 12.
Tryphoninus, 270; pupil of Scaevola, 413 f.; 419, 423, 428 f., 432 f.
Tutor, 414, 432.

U

Ulpian, 152; 266 f., 270; 431.
Undang Undang, 58.
Usus, marriage by, 48.
"Utopia," More's, 298.

V

Valin v. *Langlois* ([1879] 5 A. C. 115), 334.
Vanni, 33.
Varro, 152.
Vasquez, on war loss indemnification, 359.
Vengeance, the ancient basis of punishment, 77; modern criminal punishment is not, 98; in primitive law of damages, 155. *See* "CRIMINAL LAW."
Vico, 283.
Victorian Wills Act, 540 f., 560.
Vincent of Beauvais, 295.
Vinogradoff, Sir Paul (Professor), 283; on bóland, 390, 392.
Voet, John, 201 f.
Voet, Paul, 201, 203 f.
Voigt, 423.
VOLLENHOVEN, C. VAN, "The Study of Indonesian Customary Law," 58 f.; biographic note, 58.
Volonté Générale, 251.
Voltaire, 26, 65; 245.
Voluntary Desistance, as a defense in criminal attempts (China), 83.
Voluntary Surrender, as a defense in Chinese criminal law, 83.
Voorkeurrecht, 61.

W

Wages, regulation of, 466.
Waiver, in connection with theory of consideration, 455.
Walker v. *Walker* ([1918] West. W. Rep., Vol. 2, p. 1), 354 f.
WALTON, FREDERICK P, "Responsibility of the State for Faults of Its Officials," 63 f.; biographic note, 63.
WANG, CHUNG-HUI, "Revision of the Chinese Criminal Code," 77.
War, compensation for losses of, 158; 357 f.; Franco-Prussian, French legislation concerning, 360; modernness of Roman military law, 373 f.; Roman attitude toward, 383.
Wars of the Roses, 289.
Washington, George, use of Montesquieu, 249.
Waterschappen, 59.
Webster, Daniel, Plymouth Rock, oration, 246.
Weiss, on double nationality, 189, 193.
Wells, H. G., "Future of America," 246.
Westermarck, 46.
Westlake, theory of double nationality, 189; on comity, 222.
Wharton, 153.
White (Chief Justice), 256 f.
Wigmore, on the parol evidence rule, 529; on legal evolution, 539.
Wilken, 60.
Wilkinson, 61.
Williams, Joshua, criticism of power of testation, 553, 562.
WILLISTON, SAMUEL, "Mutual Assent in the Formation of Contracts," 525 f.
Wills, capacity to dispose of movables, by, 205; conflicts of law concerning, 213 f.; liberty of making, and some modern limitations thereon, 536 f.; transmitted to modern society by the church, 540; religious origin of, 542 f.; Roman mancipatory will was the germ of modern, 543; medieval influences on law of, 545; ambulatory, unknown prior to the conquest, 546; physical anologies employed in English law of, 546 f.; anatomical images employed in Germanic law of, 547.
Will Theory, of legal transactions, 447, 459.
WINSLOW, JOHN BRADLEY, "Some Essentials of a Modern Legal Education," 113; biographic note, 113.
Wippo, 276.

Worcester, 60.
Workmen's Compensation Act, 66, 67; in France, 467.

Y

Yelverton, 401.

Z

Zamelrecht, 62.
ZANE, JOHN M., "A Legal Heresy," 255 f.; biographic note, 255.
Zitelman, 284.

AN BWO UQc
Celebration legal essays :
Stanford Law Library
3 6105 043 767 776